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monograph 5

Preliminary Examinations, Third Edition

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Monograph 5: Preliminary Examinations

Third Edition

Criminal Procedure Monograph Series 1–8

Michigan Judicial Institute

By **Thomas Smith, J.D.**

Michigan Supreme Court

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Criminal Procedure Monograph 5: *Preliminary Examinations (Third Edition)* supersedes the revised edition of this monograph, published in 2003. This edition brings up to date the applicable statutes, court rules (including amendments to the rules governing criminal procedure effective January 1, 2006), and case law.

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Preliminary Examinations

5

Part A—Commentary

5.1 Purpose of a Preliminary Examination

*See Section 5.5(A), below, for more information on probable cause determinations.

A preliminary examination is conducted to "determine if a crime has been committed and, if so, if there is probable cause to believe that the defendant committed it." *People v Glass*, 464 Mich 266, 277 (2001). A preliminary examination functions, in part, as a screening device to ensure that there is a basis for holding a defendant to face a criminal charge. *People v Weston,* 413 Mich 371, 376 (1982). It serves the public policy of ceasing judicial proceedings where there is a lack of evidence. *People v Hunt*, 442 Mich 359, 362 (1993). A preliminary examination is not a trial to determine guilt or innocence. *People v Gaines*, 53 Mich App 443, 446 (1974). It is not necessary that the examining magistrate establish guilt beyond a reasonable doubt in order to bind the defendant over for trial. *People v Maire*, 42 Mich App 32, 37 (1972). Rather, the burden of proof is probable cause. MCR 6.110(E).*

5.2 Authority Governing Preliminary Examinations

A. Preliminary Examination Is Not Constitutionally Based

In Michigan, the right to a preliminary examination is statutory, not constitutional. In *People v Hall*, 435 Mich 599 (1990), the Michigan Supreme Court noted that "the federal constitution does not require that an adversary hearing, such as a preliminary examination, be held prior to prosecution by information." *Id.* at 603, citing *Gerstein v Pugh*, 420 US 103 (1975). The Michigan constitution also does not specifically entitle a defendant to a preliminary examination. *People v Dunigan*, 409 Mich 765, 770 (1980). See also *Hall*, *supra* at 603, citing *People v Johnson*, 427 Mich

98, 103 (1986) ("[i]n Michigan, the preliminary examination is solely a creation of the Legislature—it is a statutory right").

B. Statutes and Court Rules Governing Preliminary Examinations

The statutory sections governing preliminary examinations are found in Chapters VI and VII of the Code of Criminal Procedure, at MCL 766.1 to 766.18, and MCL 767.42. The Michigan Court Rule governing preliminary examinations is MCR 6.110.

Regarding conflicts between court rules and statutes, MCR 6.001(E) provides that Chapter 6 of the court rules, which pertains to criminal procedure, supersedes "all prior court rules in this chapter and *any statutory procedure* pertaining to and inconsistent with a procedure provided by a rule in this chapter." [Emphasis added.] See also *McDougall v Schanz*, 461 Mich 15, 30-31 (1999) (to the extent that a statute establishes a procedural rule involving the mere dispatch of judicial business, and not a substantive rule, it will be superceded by court rule or rule of evidence).

5.3 Jurisdiction of Preliminary Examinations

The district court has jurisdiction of preliminary examinations in all felony cases and *all misdemeanor cases not cognizable by the district court*. MCL 600.8311(d). A "felony" is defined in the Code of Criminal Procedure as "a violation of a penal law of this state for which the offender, upon conviction, may be punished by death or by imprisonment for more than 1 year or an offense expressly designated by law to be a felony." MCL 761.1(g). Accordingly, a defendant charged with a two-year misdemeanor, known to many as a "high court" or "circuit court" misdemeanor, is entitled to a preliminary examination under MCL 600.8311(d). A defendant charged with a one-year felony—e.g., MCL 436.1909 (unlicensed selling of liquor) or MCL 436.1919 (forging documents, labels, or stamps)—is also entitled to a preliminary examination under MCL 600.8311(d).

In *People v Laws*, 218 Mich App 447, 453-454 (1996), the Court of Appeals held that the district court, and not the circuit court, had authority to review due process claims and to order in camera inspections of discovery materials in relation to a preliminary examination. The Court found no court rule or statute prohibiting the district court from addressing due process claims before or during a preliminary examination where the facts warrant. *Id.* at 453. The Court declined to follow dicta in *People v Hernandez*, 15 Mich App 141, 147 (1968), overruled on other grounds, 114 Mich App 784 (1982), which stated that the circuit court is to determine due process issues. *Laws*, *supra* at 453. Additionally, the Court held that since defendant's denial of the charges went to the "very purpose" of a preliminary examination, the police reports sought by the defendant could contain evidence to support his defense, and

that "the district court had jurisdiction to order the in camera review of the requested documents." *Id.* at 453-454.

In *People v Moore*, 180 Mich App 301 (1989), the Court of Appeals determined that the district court cannot decide the issue of entrapment. In this case, the defendants claimed at the preliminary examination that they were entrapped by an undercover police officer, thus raising due process issues. At the conclusion of the preliminary examination, the magistrate found that the defendants were entrapped and dismissed the charges against them. The Court of Appeals found an abuse of discretion by the magistrate in failing to determine whether there was probable cause for bindover, and in failing to limit the examination to that inquiry only. The Court stated that a claim of entrapment is properly "resolved at a separate evidentiary hearing procedurally similar to what the bench and bar of this state have come to know as the Walker hearing," in which the "defendant bears the burden of proving entrapment by a preponderance of the evidence." *Id*. at 309.

A preliminary examination is not the appropriate stage to challenge the validity of prior convictions to be used for sentence enhancement purposes under Michigan's drunken driving laws. Instead, such convictions are to be considered at sentencing. "There is . . . no requirement that the prosecutor 'prove' the existence of the prior convictions, or more accurately demonstrate probable cause to believe the convictions exist, at the preliminary examination. Rather, MCL 257.625(14) [parallel citation omitted] provides simply that the prosecutor must include in the complaint and information a statement listing the defendant's prior convictions." *People v Reichenbach*, 459 Mich 109, 127 n 19 (1998). The same sentencing enhancement rationale applies to cases in which a prosecutor seeks to enhance the sentence of a defendant as a habitual offender. *People v Zinn*, 217 Mich App 340, 345-347 (1996).

Under MCL 766.7, "[a]n action on the part of the magistrate in adjourning or continuing any case, shall not cause the magistrate to lose jurisdiction of the case." Additionally, if the Court adjourns a preliminary exam without good cause, it "is deemed to be a harmless error unless the defendant demonstrates actual prejudice."

In *People v Dunson*, 139 Mich App 511, 513 (1985), the Court of Appeals determined, partly on the basis of MCL 766.7, that failure to bring the defendant to a timely preliminary examination was not a jurisdictional issue. The Court said that by pleading guilty, the defendant had waived his right to challenge the nonjurisdictional issue.

5.4 Persons Who May Conduct Preliminary Examinations

A preliminary examination must be conducted before an "examining magistrate." MCL 766.1 and MCL 767.42(1). A "magistrate" in the Code of

Criminal Procedure is "[a] judge of the district court or a judge of a municipal court." MCL 761.1(f). District court magistrates are not explicitly authorized to conduct preliminary examinations under MCL 600.8511, the statute governing the duties and jurisdiction of district court magistrates. However, when authorized by the chief judge of the district and whenever a district judge is not immediately available, district court magistrates may conduct the first appearance of a defendant before the court in all criminal and ordinance violation cases, including acceptance of any written demand or waiver of preliminary examination. MCL 600.8513(1).

In *People v Burrill,* 391 Mich 124, 137-138 (1974), the Michigan Supreme Court made the following determinations regarding the substitution of judges and magistrates at preliminary examinations:

- the judge or magistrate who arraigned the defendant is not required to conduct the preliminary examination;
- the judge or magistrate who presided over the swearing of an invalid warrant that was conclusory and lacking the operative facts, and who did not examine any witnesses before issuing the warrant, is not required to conduct the preliminary examination; and
- reasonable efforts should be made to comply with a defendant's request for a judge to preside over the preliminary examination other than the judge who has examined witnesses regarding the arrest warrant.

MCR 2.003 provides a nonexclusive list of criteria for the disqualification of judges. This list includes an *actual* bias requirement, which provides that a judge may be disqualified if he or she is "personally biased or prejudiced for or against a party or attorney." MCR 2.003(B)(1). For two cases governing disqualification on due process grounds, see, generally, *Cain v Michigan Dep't of Corr*, 451 Mich 470 (1996), and *Crampton v Dep't of State*, 395 Mich 437 (1975).

> **Note:** A common situation calling for the disqualification of a judge is when the judge has issued a search warrant. The Advisory Committee to this monograph recommends that when the validity of a search warrant is (or will be) challenged at the preliminary examination, the judge who issued the search warrant should disqualify himself or herself from hearing the examination.

MCR 6.110(F) provides that if the defendant is discharged because of lack of probable cause, any subsequent preliminary examination must be held before the same judge who conducted the first preliminary examination. This subsection of the rule also requires the prosecutor to present new evidence to support the charge. The rule is designed to prevent "judge shopping" following a dismissal after a first preliminary examination. *People v Robbins*, 223 Mich App 355, 362 (1997). If the pertinent judge is disqualified or is otherwise unavailable to conduct the second preliminary examination, the

case may be reassigned under MCR 8.111(C), which allows the chief judge to reassign another judge by written order.

5.5 Scope of Preliminary Examinations

A. Probable Cause Standard

MCR 6.110(E) requires a magistrate to make two probable cause determinations before binding a defendant over for trial: (1) probable cause to believe that an offense not cognizable by the district court has been committed; and (2) probable cause that the defendant committed such an offense. A magistrate's required findings are also contained in MCL 766.13. Unlike its court rule counterpart, MCL 766.13 does not specifically state that the magistrate must find probable cause to believe that an offense not cognizable by the district court has been committed; it only specifically requires probable cause to believe that the defendant committed such an offense. However, in *People v Fiedler*, 194 Mich App 682, 692 (1992), the Court of Appeals determined that MCL 766.13 does not conflict with MCR 6.110(E) since the statute does not attempt to change the burden of proof applicable to the determination of whether a crime has been committed but merely defines the applicable burden.

> **Note:** In accordance with the 1989 Staff Comment to MCR 6.110(E), the Advisory Committee to this Monograph recommends that the district court judge make the following determinations at the conclusion of each preliminary examination:
>
> > (1) Does the evidence establish probable cause for <u>*each*</u> of the *elements* of the offense charged?; and
> >
> > (2) Does the evidence establish probable cause that defendant committed the offense?
>
> The Advisory Committee believes that this approach is consistent with the Supreme Court and Court of Appeals cases decided before the adoption of MCR 6.110(E). The Committee also notes that this approach does not permit a bindover when there is probable cause for "most" of the elements because a bindover is permitted only when there is probable cause to establish *each and every element* of the offense charged.*

*See the remainder of this subsection for exceptions to this requirement.

A finding of probable cause requires evidence "sufficient to cause an individual marked by discreetness and caution to have a reasonable belief that the defendant is guilty as charged." *People v Justice (After Remand)*, 454 Mich 334, 343 (1997). The Supreme Court in *Justice (After Remand)* cited *Coleman v Burnett*, 155 US App DC 302, 317 (1973), to the effect that evidence sufficient for a showing of probable cause could leave room for doubt about defendant's guilt. Proof beyond a reasonable doubt is not

necessary. See *People v Lunsford*, 20 Mich App 325, 327 (1969) (upholding district court probable cause determination based upon a witness's preliminary examination testimony that he "thought" defendant was the armed robber, even though he was not completely positive of it).

Probable cause must be demonstrated for each element of the offense charged, or there must be evidence from which the elements can be inferred. *People v Mason*, 247 Mich App 64, 72 (2001). An exception is provided in MCL 767.71, which states that it is not necessary, in indictments or informations related to murder or manslaughter, to "set forth the manner in which nor the means by which the death of the deceased was caused." Instead, MCL 767.71 requires only a showing that the defendant murdered or killed the deceased.* Additionally, in *People v Coddington*, 188 Mich App 584, 592-594 (1991), the Court of Appeals held that the "elements of premeditation and deliberation are not required elements for which evidence must be presented at a preliminary examination in order to bind a defendant over for trial on open murder charges." *Id.* at 594, adopting Justice Boyle's opinion in *People v Johnson*, 427 Mich 98, 107-109 (1986). The Court of Appeals noted, however, that another panel, in *People v Gonzalez*, 178 Mich App 530, 531 (1989), expressed doubt as to whether that opinion expressed a majority position.

*Another statute, MCL 750.318, requires the ascertainment of the degree of murder but only when the defendant is convicted by jury or confession, i.e., by plea.

The scope of the magistrate's inquiry is not limited to whether the prosecution has presented evidence on each element of the offense. Instead, the magistrate is required to make his or her determination only after an "examination of the whole matter," based on legally admissible evidence. *People v Stafford*, 434 Mich 125, 133 (1990), citing *People v King,* 412 Mich 145, 153-155 (1981). See also *People v Crippen*, 242 Mich App 278, 282 (2000) ("The district court's inquiry is not limited to whether the prosecution has presented sufficient evidence on each element of of [sic] the offense, but extends to whether probable cause exists after an examination of the entire matter based on legally admissible evidence.")

An "examination of the whole matter" requires the magistrate to consider mitigating evidence, including evidence of provocation. In addition, the magistrate should also consider the weight and competency of the evidence, and the credibility of witnesses. In *People v Neal*, 201 Mich App 650, 655 (1993), a case involving an ugly racial incident, the defendant had been chased by a crowd for up to one-half mile, until the decedent, who was initially part of the crowd, caught up with defendant in a trailer park. Although defendant previously fired two warning shots in the air while being chased by the crowd, and he later warned the decedent in the trailer park that he did not want to shoot him, defendant shot and killed the decedent. Testimony at the examination conflicted as to whether the decedent was advancing or turning slightly away from defendant at the time of the shooting. The district court bound defendant over on voluntary manslaughter instead of second-degree murder, finding no evidence of malice to support the murder charge. The circuit court reversed, noting the conflict in evidence of whether the decedent was advancing or turning away at the time of the shooting. The Court of

Appeals concluded that the circuit court erred in reversing the district court's dismissal of the murder charge, since the circuit court too narrowly construed the magistrate's scope of inquiry on the probable cause determination. The Court found no abuse of discretion in the district court's finding, based upon an "examination of the whole matter," that defendant did not act with malice, and that he felt he was in mortal fear for his safety and well-being. *Id*. at 656.

"If the evidence introduced at the preliminary examination conflicts or raises a reasonable doubt about the defendant's guilt, the magistrate must let the factfinder at trial resolve those questions of fact. This requires binding the defendant over for trial." *People v Hudson*, 241 Mich App 268, 278 (2000).

In *People v Yost*, 468 Mich 122, 127-128 (2003), the Supreme Court emphasized that existing case law requires a magistrate to pass judgment on the credibility of the witnesses when determining whether a crime has been committed. The Court further indicated that a magistrate has the same duty and responsibility with regard to both lay and expert witnesses. *Id.* at 128.

The Court in *Yost* also addressed the "gap" between probable cause and reasonable doubt:

> "The fact that the magistrate may have had reasonable doubt that defendant committed the crime was not a sufficient basis for refusing to bind defendant over for trial. As we stated in [*People v Justice (After Remand),* 454 Mich 334, 344 (1997)], a magistrate may legitimately find probable cause while personally entertaining some reservations regarding guilt." *Yost, supra* at 133-134.

In *People v Perkins*, 468 Mich 448, 450 (2003), the Michigan Supreme Court reversed the Court of Appeals' ruling that reinstated the defendant's CSC–I charge. *Perkins* involved a 16-year-old girl (complainant) and a Bay County Sheriff (defendant). The complainant and the defendant had been acquainted for four years during which time a sexual relationship developed between them. The complainant often babysat the defendant's children, attended church with the defendant's family, and for a time resided with the defendant's family, and the defendant's wife coached the complainant's basketball team.

In *Perkins*, the Michigan Supreme Court emphasized the standard by which preliminary examination evidence is to be measured before satisfying the quantum necessary to a bind a defendant over for trial. The Court reiterated several well-established guidelines for conducting a proper preliminary examination. The prosecutor need not establish a defendant's guilt beyond a reasonable doubt at the preliminary exam stage, but a defendant cannot be bound over if the prosecutor has failed to present evidence on each element of the charged offense. The evidence presented need not convince the presiding magistrate of the defendant's guilt; doubt is properly resolved by the trier of fact provided the prosecutor has established probable cause that the defendant

committed a crime. Conviction of a CSC–I charge requires proof of force or coercion.

In contrast to the Court of Appeals, the Michigan Supreme Court found that the prosecutor did not present evidence of coercion and the prosecutor's theory that the defendant established a pattern of abuse that eroded the victim's ability to resist the sexual advances did not amount to coercion *Perkins, supra* 454.

The Supreme Court dismissed the defendant's CSC–I charge because "the record shows that no evidence was presented at the preliminary hearing to support the prosecutor's assertion that the complainant was coerced, in any sense of that term, to fellate defendant on the occasion in question." *Id*.

B. Controlling the Manner in Which a Preliminary Examination Is Conducted

The manner in which a preliminary examination is conducted is largely within the sound discretion of the examining magistrate. See *People v Maire*, 42 Mich App 32, 39 (1972) ("The examining magistrate is not merely an impartial observer; he has the power and the responsibility to control the proceedings and to see that the evidence presented is within the general bounds of competency, relevancy and materiality.") As one example of this discretion, the Court of Appeals in *Maire* ruled that a magistrate has discretion to require an in-court identification lineup to assure the reliability of the identification process. *Id.* at 39-41.

Although MCL 766.4 specifically requires a magistrate to "examine the complainant and the witnesses in support of the prosecution" at the preliminary examination, the Court of Appeals, in *People v Meadows*, 175 Mich App 355, 359 (1989), held that the statute only requires examination of "those witnesses offered in support of the prosecution. The testimony of the complainant is not necessarily required at every preliminary examination if sufficient other evidence is produced." To hold otherwise, the Court stated, would give rise to a statutory violation if the complainant died before the examination or was otherwise unavailable to testify, and "[s]uch unjust and absurd consequences were not intented [sic] by the Legislature." *Id*. at 358.

5.6 Defendant's Right to a Preliminary Examination

A. General Provisions

The prosecutor and defendant are entitled to a prompt examination and determination by an examining magistrate. MCL 766.1 and MCR 6.110(A). A preliminary examination before an examining magistrate must precede the filing of an information against any person for a "felony," unless the person waives the right to the examination. MCL 767.42(1). A "felony" is an offense

for which the offender, upon conviction, may be punished by imprisonment for more than one year, or an offense expressly designated by law to be a felony. MCL 761.1(g). This definition thus includes what is commonly known as "high court" or "two-year" misdemeanors, as well as one-year felonies that are expressly designated as felonies.

B. Right to Preliminary Examination on New Charges Added Following Arraignment in Circuit Court

A defendant is entitled to a preliminary examination on new charges that have elements different from the original charges in the information and are added following defendant's arraignment in circuit court. In *People v Price*, 126 Mich App 647 (1983), the Court of Appeals ruled that the trial court committed error when it amended the information by adding a charge of receiving and concealing stolen property to the existing offense of breaking and entering a business place because defendant received no preliminary examination on the added charge, and the trial court thus did not have jurisdiction over that offense. *Id.* at 654-655. However, a defendant is not entitled to a preliminary examination on an added charge where the charge is supported by testimony at the first examination, the defense would not have altered its questioning because of the new charge, and the prosecutor suggested additional questioning of the victim. See *People v Hunt*, 442 Mich 359, 363-365 (1993) (examining magistrate erred by not granting prosecutor's motion, made at the close of the preliminary examination, to amend one charge from gross indecency to third-degree criminal sexual conduct because the amendment did not cause unacceptable prejudice to the defendant because of unfair surprise, inadequate notice, or insufficient opportunity to defend). Similarly, no preliminary examination is warranted where the added charge is supported by testimony at the first examination and is uncontested by the defendant, the defendant's strategy would not have changed with knowledge of the added charge, the added charge was sought four months after the examination, and defendant had ample time to meet the new charge. *People v Forston*, 202 Mich App 13, 16-17 (1993).

In the absence of unfair surprise or prejudice, a defendant has no right to a preliminary examination on a new charge added on the prosecutor's motion to an information filed after the defendant waived preliminary examination on the original offense. MCR 6.112(H); *People v McGee*, 258 Mich App 683, 693 (2003).

An accused has a statutory right to a preliminary examination when the prosecution is initiated by filing an information, and a prosecutor is authorized to file an information once the magistrate binds a defendant over to circuit court following a preliminary examination or once the defendant has waived preliminary examination on the offense. *McGee*, *supra* at 695; MCL 766.1; MCL 767.42(1). Once the information is filed, the circuit court has jurisdiction over the defendant and the case, and the court may amend the information at any time "unless the proposed amendment would unfairly surprise or prejudice the defendant." MCR 6.112(H); *McGee*, *supra* at 696.

In *McGee*, the Michigan Court of Appeals concluded that the prosecution's motion to amend the information on the first day of the defendant's trial supported the defendant's claim of surprise, but the defendant failed to show that she suffered any actual prejudice as a result. *McGee*, *supra* at 696. In the absence of any *unfair* surprise or prejudice, the trial court did not abuse its discretion in permitting the amendment of the information to add the charge for which the defendant was ultimately convicted. *Id*. at 696.

C. No Right to Preliminary Examination Following Grand Jury Indictment

A defendant does not have a substantive right to a preliminary examination following a grand jury indictment. In *People v Glass (After Remand)*, 464 Mich 266, 271 (2001), the Supreme Court overruled *People v Duncan*, 388 Mich 489 (1972), and its implementing court rules, insofar as it created a substantive right to a preliminary examination for indictees. The Supreme Court in *Glass* held that the *Duncan* Court, which declined to rely on due process principles, exceeded its criminal procedure rulemaking authority by granting indictees the substantive right to a preliminary examination and by implementing former MCR 6.110(A) and former MCR 6.112(B). MCR 6.110(A) previously provided that if a defendant waived his or her right to a preliminary exam, the court must then bind the defendant over for trial on the "charge set forth in the complaint or indictment." MCR 6.112(B) previously provided that an "indictment may be returned and filed before a defendant's preliminary examination. . . . When this occurs, the indictment may substitute for the complaint . . . ." Effective January 1, 2006, MCR 6.110(A) and (B) have been amended to reflect the holding in *Glass*. MCR 6.110(A) states:

> **"(A) Right to Preliminary Examination.** Where a preliminary examination is permitted by law, the people and the defendant are entitled to a prompt preliminary examination. If the court permits the defendant to waive the preliminary examination, it must bind the defendant over for trial on the charge set forth in the complaint or any amended complaint."

Effective January 1, 2006, MCR 6.112(B) states, in part, "An indictment is returned and filed without a preliminary examination. When this occurs, the indictment shall commence judicial proceedings."

D. Right to Preliminary Examination for Fugitive From Justice

An information may be filed without a preliminary examination against a fugitive from justice. MCL 767.42(2); see also MCR 6.112(B) ("[u]nless the defendant is a fugitive from justice, the prosecutor may not file an information until the defendant has had or waives a preliminary examination").

The purpose of MCL 767.42(2) is to allow prosecuting attorneys to file informations against fugitives from justice and then to use the informations to extradite them once they have been apprehended. In *People v Fleisher*, 322 Mich 474, 488-489 (1948), the defendant was extradited from California and arraigned in circuit court in Michigan without having had a preliminary examination. Defendant pled not guilty at the arraignment. Five days before trial, defendant filed a motion to quash the information on the basis that he was not afforded the right to arraignment on the original complaint and warrant. The circuit court denied the motion to quash. The Supreme Court found no abuse of discretion and thus no error in the circuit court's denial, holding that defendant waived any prior alleged defects or irregularities when he pled not guilty at his arraignment in circuit court.

Therefore, if a fugitive from justice wishes to have a preliminary examination, he or she should file a motion in circuit court for remand to district court for a preliminary examination.

5.7 Juvenile's Right to a Preliminary Examination

A. Right to a Preliminary Examination in "Automatic Waiver" Cases

A juvenile has a right to a preliminary examination in an "automatic waiver" case. In an "automatic waiver" case, a prosecutor who has reason to believe that a juvenile aged 14 but less than 17 has committed a "specified juvenile violation" may file a complaint and warrant in district court, which divests the family division of circuit court of jurisdiction. MCL 764.1f(1) and MCL 712A.2(a)(1). A prosecutor must then follow the same preliminary examination procedures as are applicable for adult defendants charged with criminal offenses. See MCR 6.901(A) (the rules in Subchapter 6.900 governing "automatic waiver" cases "take precedence over, but are not exclusive of, the rules of procedure applicable to criminal actions against adult offenders"). See also MCR 6.911, governing waivers of preliminary examinations by juveniles represented by lawyers, and transfers of cases to "juvenile court."

"Specified juvenile violations" are:

- Burning a dwelling house, MCL 750.72.
- Assault with intent to murder, MCL 750.83.
- Assault with intent to maim, MCL 750.86.
- Assault with intent to rob while armed, MCL 750.89.
- Attempted murder, MCL 750.91.
- First-degree murder, MCL 750.316.

- Second-degree murder, MCL 750.317.
- Kidnapping, MCL 750.349.
- First-degree criminal sexual conduct, MCL 750.520b.
- Armed robbery, MCL 750.529.
- Carjacking, MCL 750.529a.
- Bank, safe, or vault robbery, MCL 750.531.
- Assault with intent to do great bodily harm if armed with a "dangerous weapon," MCL 750.84.
- First-degree home invasion if armed with a "dangerous weapon," MCL 750.110a(2).
- Escape or attempted escape from a medium- or high-security juvenile facility operated by the Department of Human Services (DHS)*, or a high-security facility operated by a private agency under contract with the DHS, MCL 750.186a.
- Manufacture, sale, or delivery, MCL 333.7401(2)(a)(i); or possession, MCL 333.7403(2)(a)(*i*), of 650 grams or more of a Schedule 1 or 2 narcotic or cocaine.
- Any attempt, solicitation, or conspiracy to commit any of the foregoing crimes;
- Any lesser-included offense of the foregoing offenses arising out of the same transaction if the juvenile is charged with a specified juvenile violation; and
- Any other violation arising out of the same transaction if the juvenile is charged with one of the above offenses.

MCL 712A.2(a)(1)(A)–(I); MCL 600.606(2)(a)–(i); and MCL 764.1f(2)(a)–(i).

*Formerly the Family Independence Agency (FIA).

As used in the context of a "specified juvenile violation," a "dangerous weapon" means one of the following:

- A loaded or unloaded firearm, whether operable or inoperable.
- A knife, stabbing instrument, brass knuckles, blackjack, club, or other object specifically designed or customarily carried or possessed for use as a weapon.
- An object that is likely to cause death or bodily injury when used as a weapon and that is used as a weapon or carried or possessed for use as a weapon.

- An object or device that is used or fashioned in a manner to lead a person to believe the object or device is a weapon.

MCL 712A.2(a)(1)(B); MCL 600.606(2)(b); and MCL 764.1f(2)(b).

B. No Right to a Preliminary Examination in "Traditional Waiver" Cases

A juvenile does not have a right to a preliminary examination following waiver in a "traditional waiver" case. MCL 712A.4(10).* A "traditional waiver" affects juveniles aged 14 but under 17 who are accused of acts that if committed by an adult would be a felony. The family division of circuit court in the county in which the offense is alleged to have been committed may waive jurisdiction upon motion of the prosecuting attorney. After waiver, the juvenile may be tried in the court having general criminal jurisdiction of the offense. MCL 712.4(1).

*For a complete discussion of "traditional waiver" proceedings, see Miller, *Juvenile Justice Benchbook (Revised Edition)* (MJI, 2003), Chapter 16.

There are two phases to a "traditional waiver" proceeding. The first phase, known as a Phase 1 probable cause hearing, is similar to a preliminary examination. It consists of a hearing in the family division to determine whether there is probable cause that an offense has been committed that would be a felony if committed by an adult, and whether there is probable cause that the juvenile who is 14 years of age but less than 17 committed the offense. MCL 712A.4(3).* Juveniles must be afforded the same constitutional protections during Phase 1 hearings as adults are afforded in a preliminary examination. See *People v Hana*, 443 Mich 202, 225 n 62 (1993), and the cases cited therein.

*These findings may be made at a preliminary hearing provided that legally admissible evidence was used to establish probable cause. MCR 3.950(D)(1)(c)(*i*).

The second phase, known as a Phase 2 "best interests" hearing, is a hearing in which the court determines whether the interests of the juvenile and the public would best be served by granting the motion for waiver of jurisdiction. MCR 3.950(D)(2). If the juvenile had previously been subject to the general criminal jurisdiction of the circuit court under MCL 712A.4 or MCL 600.606, the court must waive jurisdiction without holding a Phase 2 hearing. MCR 3.950(D)(2). If jurisdiction is waived, the juvenile must be arraigned on an information filed by the prosecutor in the circuit court. MCL 712A.4(10).

5.8 Fourteen-Day Rule for Preliminary Examinations

The prosecutor and the defendant are entitled to a prompt examination. MCR 6.110(A) and MCL 766.1. The district court magistrate must set a date for a preliminary examination not exceeding 14 days after the arraignment on the warrant. MCR 6.104(E)(4) and MCL 766.4. When computing the 14-day period, the magistrate should refer to MCR 1.108(1) and exclude from the 14-day period the day of the arraignment but include the last day of the period, unless it falls on a Saturday, Sunday, legal holiday, or holiday on which the

court is closed by court order. In that event, the period runs until the end of the following day that is not a Saturday, Sunday, legal holiday, or holiday on which the court is closed. *Id*.

Preliminary examinations for juveniles in "automatic waiver" cases must follow the same procedures as preliminary examinations for adult defendants charged with criminal offenses. See, generally, MCR 6.110 and MCR 6.901(A) (the rules in Subchapter 6.900 governing "automatic waiver" cases "take precedence over, but are not exclusive of, the rules of procedure applicable to criminal actions against adult offenders").

Unless the preliminary examination is adjourned, it must be held on the date set by the court during the arraignment on the warrant or complaint. MCR 6.110(B). A violation of MCR 6.110(B) "is deemed to be harmless error unless the defendant demonstrates actual prejudice." *Id.*

A magistrate who sets a date for a preliminary examination beyond the statutory deadline must discharge the defendant without prejudice to the prosecutor's right to initiate another action against that defendant. *People v Weston*, 413 Mich 371, 372 (1982). However, if properly scheduled, the examination may be adjourned or continued for good cause shown. *People v Horne*, 147 Mich App 375, 378 (1985). The Supreme Court in *Weston* noted that the Legislature, by requiring a prompt examination in MCL 766.1, sought to prevent a situation in which a presumptively innocent defendant remains in custody "until a convenient time arrives for the magistrate to conduct the preliminary examination." *Id.* at 376.

Where a preliminary examination is adjourned or continued, it need not be rescheduled within the next 14 days. In *People v Johnson*, 146 Mich App 429, 437-438 (1985), the defendant sought a continuance of the preliminary examination on the date it was set to begin, claiming he had not yet received a police report from the prosecution. After defendant waived the statutory time period, which was then 12 days, the preliminary examination was held 13 days after the requested adjournment. The Court of Appeals held that good cause for adjournment may require postponement beyond the statutory period.

There is no requirement that a preliminary examination, once started, be completed within the statutory time-period established for commencing the examination. See *People v Lewis*, 160 Mich App 20, 31 (1987), citing *Johnson*, *supra* at 438, which involved a preliminary examination that was begun within the statutory time period but postponed numerous times beyond it for good cause.

5.9 Adjournment, Continuance, or Delay of Preliminary Examination

*Effective January 1, 2006.

If a party objects, a magistrate must find on the record good cause in order to adjourn the preliminary examination. MCR 6.110(B).* MCL 766.7 states, in part, that "[a]n adjournment, continuance, or delay of a preliminary examination shall not be granted by a magistrate except for good cause shown."

MCL 766.7 also provides the standard for granting adjournments by consent of the parties:

> "A magistrate shall not adjourn, continue, or delay the examination of any cause by the consent of the prosecution and accused unless in his discretion it shall clearly appear by a sufficient showing to the magistrate to be entered upon the record that the reasons for such consent are founded upon strict necessity and that the examination of the cause cannot then be had, or a manifest injustice will be done."

Thus, under MCL 766.7, a postponement agreed upon by the prosecution and the defendant can be granted only upon the magistrate's determination that the reasons entered on the record show strict necessity or the potential for manifest injustice by failure to delay.

Effective January 1, 2006, MCR 6.110(B) states that "[i]f the parties consent, for good cause shown, the court may adjourn the preliminary examination for a reasonable time."

An examination timely scheduled then postponed with no showing on the record does not provide grounds for dismissal if good cause is self-evident from the record. *People v Buckner*, 144 Mich App 691, 694-695 (1985).

The following published Michigan appellate opinions illustrate judicial determinations of "good cause":

- The unavailability of witnesses because they were needed in federal court or because they were police officers on vacation, *People v Horne*, 147 Mich App 375, 383 (1985).
- The unavailability of witnesses because they were hospitalized, *People v Buckner*, 144 Mich App 691, 694 (1985).
- Witnesses who were absent but were likely to be produced and testify, *People v Den Uyl*, 320 Mich 477, 488 (1948).
- Scheduling conflicts affecting defense counsel, or illnesses affecting the prosecutor's wife and the magistrate, *People v Lewis*, 160 Mich App 20, 32 (1987).

- Appointment of counsel, and allowing appointed counsel to gain familiarity with the case before the preliminary examination, *People v Brown*, 19 Mich App 66, 68 (1969), and *People v Eddington,* 77 Mich App 177, 186-190 (1977).

  Note: MCR 6.005(E) states that "[t]he court may refuse to adjourn a proceeding to appoint counsel or allow a defendant to retain counsel if an adjournment would significantly prejudice the prosecution, and the defendant has not been reasonably diligent in seeking counsel."*

*Effective January 1, 2006.

Simple docket congestion, without a showing of unusual circumstances, does not constitute good cause. See *People v Twomey*, 173 Mich App 247 (1988) (a "self-inflicted congested docket is not superior to a defendant's right to a timely examination").

A violation of MCR 6.110(B)* "is deemed to be harmless error unless the defendant demonstrates actual prejudice."

*Effective January 1, 2006.

5.10 "Special Adjournments" of Preliminary Hearings in Cases Involving Juveniles

In "automatic waiver" cases, preliminary examinations generally must be held within 14 days after the juvenile's arraignment. MCR 6.907(C)(2). However, if a delinquency petition has been filed, the family division of circuit court, upon the prosecutor's request, must adjourn the preliminary hearing in the delinquency case for up to five days to allow the prosecutor to decide whether to authorize the filing of a complaint and warrant in district court. MCR 3.935(A)(3)(a). If the prosecuting attorney files a complaint and warrant in district court, an arraignment must be held, and following the arraignment, the district court must set a date for the juvenile's preliminary examination within the next 14 days. The period consumed by the special adjournment, "up to three days," must be deducted from the 14 days allowed for conducting the preliminary examination following arraignment. MCR 6.907(C)(2). If the prosecutor does not authorize the filing of a complaint and warrant in district court, the family division must proceed with the preliminary hearing in the delinquency case, but the prosecutor is not precluded from proceeding under the "traditional waiver" statute and court rule, MCL 712A.4 and MCR 3.950. MCR 3.935(A)(3)(c).

5.11 Right to Counsel at Preliminary Examinations

The preliminary examination is a critical stage of criminal proceedings, which entitles an indigent defendant to an appointed attorney. *People v Carter*, 412 Mich 214, 217-218 (1981), citing *Coleman v Alabama*, 399 US 1, 11 (1970). Additionally, MCL 766.12 states, in part, that a defendant may be assisted by counsel in examining and cross-examining the witnesses for the defendant

and the prosecution after prosecution witnesses testify. In *Carter*, *supra*, the Michigan Supreme Court ruled that where defendant's right to counsel at the preliminary examination has been denied, the case may be remanded to the trial court to determine whether defendant was prejudiced by that denial beyond a reasonable doubt. *Id.* at 218.

At arraignment on the warrant, the court must advise the defendant of the right to have the assistance of counsel at all subsequent court proceedings. *Id*. It also must inform defendant that the court will appoint an attorney if defendant wants one and is unable to retain one. MCR 6.005(A) and MCR 6.104(E). Where a defendant charged with a felony appears for a preliminary examination without an attorney and has not waived the examination, the court must advise the defendant regarding the right to an appointed attorney. MCL 775.16.

*See also Sections 5.12-5.13, below.

If defendant has waived the assistance of counsel, the court must readvise the defendant regarding the right to counsel at each subsequent proceeding and ensure that the defendant has waived that right. MCR 6.005(E).*

Defendant's right to cross-examination at a preliminary examination is denied where defendant has spoken to an attorney, declines appointed counsel but indicates no intention to waive the right to counsel, is unrepresented when testimony is taken, and is not granted a reasonable delay in order to acquire counsel. In *People v Pulley*, 37 Mich App 715, 721 (1972), the defendant refused appointed counsel and then appeared at the preliminary examination without retained counsel, saying his brother had contacted an attorney. Neither defendant's brother nor that attorney appeared at the preliminary examination. The court adjourned the examination for seven days, three days shy of the expiration of the then-existing 10-day time limit. On the next scheduled examination date, defendant appeared without retained counsel, saying he had contacted an attorney and told the attorney the date and time of the examination. The court decided to proceed with the examination, and defendant, without counsel, cross-examined a prosecution witness. The court adjourned the examination for another seven days. At this stage of the proceedings, defendant appeared with retained counsel, who moved to strike the previous testimony given during defendant's pro se cross-examination. The court denied the motion. At trial, this testimony was introduced and led in part to defendant's conviction. The Court of Appeals determined that the judge should have granted an adjournment, even beyond the then-existing 10-day limit, to allow defendant time to find an attorney. In finding that defendant's cross-examination rights had been violated, the Court relied in part on *Douglas v Alabama*, 380 US 415 (1965), which applied the Sixth Amendment right to cross-examine and confront witnesses to the states through the 14th Amendment, and *Pointer v Texa*s, 380 US 400 (1965), which ruled that where such rights are denied, testimony taken at a preliminary examination may not be admitted at trial.

A defendant is denied the counsel of his or her choice where the court precludes defendant's representation by retained counsel at the preliminary examination because counsel has been retained for that proceeding only. In *People v Humbert*, 120 Mich App 195, 197-198 (1982), the trial court appointed counsel for defendant at her request but would not permit her subsequently retained counsel to represent her at the examination. Appointed counsel proceeded with the examination. The Court of Appeals found that the trial court erred in disallowing use of retained counsel, citing a precursor to MCR 6.005(E), which specifically provided that if a defendant wishes to retain a lawyer, the defendant should have a reasonable opportunity to do so.* However, the Court determined that the error resulted in no manifest injustice and was harmless beyond a reasonable doubt.

*MCR 6.005(E) currently contains a similar provision.

> **Note:** Although the court must allow the defendant a reasonable opportunity to retain an attorney, MCR 6.005(E)* states "[t]he court may refuse to adjourn a proceeding to appoint counsel or allow a defendant to retain counsel if an adjournment would significantly prejudice the prosecution, and the defendant has not been reasonably diligent in seeking counsel."

*Effective January 1, 2006.

If a juvenile in an "automatic waiver" case is not represented by an attorney, the magistrate or court must advise the juvenile at each stage of the criminal proceedings of the right to the assistance of an attorney and reaffirm that the juvenile continues to waive the right. MCR 6.905(A). If the juvenile has not retained counsel and has not waived the right to be represented by an attorney, the court must appoint an attorney to represent the juvenile. MCR 6.905(B).

5.12 Waiver of Right to Counsel

MCR 6.005(D) states, in part:

> "The court may not permit the defendant to make an initial waiver of the right to be represented by a lawyer without first
>
> > "(1) advising the defendant of the charge, the maximum possible prison sentence for the offense, and any mandatory minimum sentence required by law, and the risk involved in self-representation, and
> >
> > "(2) offering the defendant the opportunity to consult with a retained lawyer or, if the defendant is indigent, the opportunity to consult with an appointed lawyer."

Additionally, the Michigan Supreme Court, in *People v Anderson*, 398 Mich 361, 367-368 (1976), established three requirements for granting a defendant's request to dismiss counsel and proceed in pro per:

- the request must be unequivocal;

- the trial judge must determine whether the defendant is asserting his right knowingly, intelligently, and voluntarily. The trial court must make the defendant aware of the dangers and disadvantages of self-representation. The defendant's competence (unrelated to legal skills) is a pertinent consideration in making this determination; and

- the trial judge must determine that the defendant's acting as his own counsel will not disrupt or unduly inconvenience and burden the court and the administration of the court's business.

The court must advise defendant of his or her right to a lawyer even though the defendant has waived this right at a prior court proceeding. Thus, before the proceeding begins, MCR 6.005(E)(1)-(3) requires that:

> "(1) the defendant must reaffirm that a lawyer's assistance is not wanted; or
>
> "(2) if the defendant requests a lawyer and is financially unable to retain one, the court must appoint one; or
>
> "(3) if the defendant wants to retain a lawyer and has the financial ability to do so, the court must allow the defendant a reasonable opportunity to retain one."

*Effective January 1, 2006.

The court may refuse to adjourn the hearing to allow the defendant to find counsel or have counsel appointed if the court finds that the defendant has not been reasonably diligent in seeking counsel and that an adjournment would significantly prejudice the prosecution. MCR 6.005(E).*

In *People v Adkins (After Remand)*, 452 Mich 702 (1996), the Supreme Court held that courts must substantially comply with the requirements of MCR 6.005(D) and *Anderson*, *supra*, before permitting a defendant to waive counsel and proceed in pro per: "Substantial compliance requires that the court discuss the substance of both *Anderson* and MCR 6.005(D) in a short colloquy with the defendant, and make an express finding that the defendant fully understands, recognizes, and agrees to abide by the waiver of counsel procedures." *Adkins (After Remand)*, *supra* at 726-727. The Supreme Court further stated that "[i]f a judge is uncertain regarding whether any of the waiver procedures are met, he should deny the defendant's request to proceed in propria persona, noting the reasons for the denial on the record. . . . The defendant should then continue to be represented by retained or appointed counsel, unless the judge determines substitute counsel is appropriate." The Court determined that waiver was properly granted in the consolidated *Adkins* cases. *Id.* at 728-731.

A defendant's waiver of counsel at a preliminary examination is considered knowing, intelligent, and voluntary under *Anderson* where (1) defendant's request for self-representation was unequivocal, even if defendant reserved the right to retain counsel at a later date; (2) the trial court adequately informed the defendant of the dangers and potentially serious consequences

of self-representation and determined that the defendant's competence was sufficient to allow assertion of the constitutional right to self-representation; and (3) defendant's self-representation would not disrupt or unduly inconvenience the court or the administration of the court's business, a finding implicit in the district court's ruling to allow the defendant to proceed on his own. *People v Eddington*, 77 Mich App 177, 183-184 (1977).

A defendant's refusal to cooperate with his appointed counsel and his unequivocal request to be provided with a different defense attorney at trial does not constitute a waiver of counsel or operate as the defendant's request to proceed in propria persona where the record shows that "[the] defendant clearly and unequivocally declined self-representation." *People v Russell*, 471 Mich 182, 194 (2004).

In *Russell*, the defendant informed the trial court at the beginning of trial that he wanted the trial court to appoint a substitute for the defendant's *second* court-appointed attorney. The court refused to appoint different counsel unless the defendant offered "some valid reason" other than "personality difficulties" to justify the appointment of a third defense attorney. The defendant failed to provide any such explanation, and the court explained to the defendant his options: (1) the defendant could retain the counsel of his choice; (2) the defendant could continue with the present attorney's representation; (3) the defendant could represent himself without any legal assistance; or (4) the defendant could represent himself with the assistance of his present attorney. The defendant continued to express his dissatisfaction with his present attorney's defense at the same time that he clearly indicated that he did not wish to conduct his own defense, that he "needed" to be provided with "competent counsel." *Russell, supra* at 184-186.

The *Russell* Court reaffirmed the "requirements regarding the judicial inquest necessary to effectuate a valid waiver and permit a defendant to represent himself" as set forth in *Faretta v California*, 422 US 806 (1975), and first adopted by the Michigan Supreme Court in *Anderson, supra. Russell*, *supra* at 190. Applying those requirements to the facts in *Russell*, the Court concluded:

> "In this case, a review of the record indicates two key facts: first, that defendant expressly rejected self-representation and, second, that defendant never voluntarily waived his Sixth Amendment right to the assistance of counsel at trial. Indeed, defendant clearly sought appointment of *another* trial counsel, and defendant and the trial court engaged in a lengthy dialogue over defendant's desire to have substitute counsel appointed.
>
> "While defendant was given clear choices, defendant consistently denied that *his* choice was self-representation. Throughout his colloquy with the trial court, defendant steadfastly rejected the option of proceeding to trial without the assistance of counsel. Therefore, it cannot be said, as the

> Court of Appeals and dissenting opinions maintain, that defendant *unequivocally* chose self-representation and voluntarily waived his Sixth Amendment right to counsel.
>
> "We believe that defendant's repudiation of self-representation was unmistakable in this case. However, to the degree that defendant's refusal to explicitly choose between continued representation by appointed counsel and self-representation created any ambiguity regarding plaintiff's desire to unequivocally waive his right to trial counsel, any ambiguity should have been resolved in favor of representation because, consistently with *Adkins* and United States Supreme Court precedent, courts *must* indulge every reasonable presumption against the waiver of the right to counsel." *Russell, supra* at 192-193. [Footnotes omitted.]

A defendant may make an unequivocal, knowing, intelligent, and voluntary waiver of his right to counsel even though the defendant's request to represent himself was prompted by his dissatisfaction with his counsel's cross-examination of two prosecution witnesses, and the trial court denied the defendant's request to recall the witnesses so that he could question them. *People v Williams*, 470 Mich 634, 647 (2004).

During the trial in *Williams*, the defendant expressed his desire to represent himself and asked to be permitted to question two witnesses who had already been excused. After the trial court clearly advised the defendant that the witnesses would not be recalled and he would not have the opportunity to question them, the defendant stated that he still wished to proceed with self-representation. The defendant then asserted that the witnesses' testimony at his preliminary examination would rebut the unfavorable testimony given by the witnesses at trial and asked to have their preliminary examination testimony read at trial. The court denied this request and the defendant's subsequent request to be allowed time to review the preliminary examination transcript himself. Despite the trial court's denial of all his requests, the defendant again expressed an unequivocal desire to represent himself and waive counsel. *Williams, supra* at 637-639. According to the Court, "Defendant's unrealistic 'hopes of introducing evidence' in contravention of the court's explicit ruling do not render invalid defendant's unequivocal invocation of his right to self-representation." *Williams, supra* at 644.

The trial court further complied with the requirements of MCR 6.005 by establishing a record of the defendant's knowing, intelligent, and voluntary waiver of the right to counsel. The trial court determined that the defendant understood the charges against him, was aware of any mandatory minimum sentences associated with conviction of the charges, and knew of the maximum sentences possible for conviction of the charges. The trial court further advised the defendant of the risks involved in his decision to represent himself, and again the defendant expressed an unequivocal desire to waive his right to counsel and proceed in propria persona. *Williams, supra* at 646-647.

The *Williams* Court acknowledged the circumstances under which the defendant initiated his waiver but noted the defendant's consistent affirmation of this decision in light of the trial court's rulings:

> "Although defendant appeared to condition his initial waiver of counsel on the trial court's agreement to allow him to recall and cross-examine two excused witnesses, he subsequently made an intelligent, knowing, and voluntary waiver of his right to counsel after the trial court rejected defendant's request to recall and cross-examine the witnesses." *Williams, supra* at 647.

By order issued November 9, 2005, the Michigan Supreme Court reversed a Court of Appeals judgment (briefly discussed below) involving a defendant who was denied permission to represent himself at trial. *People v Chaaban (Chaaban I)*, ___ Mich ___ (2005). According to the Michigan Supreme Court, in violation of *Faretta v California*, 422 US 806 (1975), "[t]he trial court erroneously denied defendant's unequivocal request to represent himself[.]" *Chaaban I, supra* at ___.

In *People v Chaaban (Chaaban II)*, unpublished opinion per curiam of the Court of Appeals, decided March 29, 2005 (Docket No. 253513), the Court of Appeals concluded that the trial court did not err when it refused to permit the defendant to represent himself at trial. According to the Court of Appeals, it was plain that "defendant's request to represent himself changed from unequivocal to equivocal after listening to the court's discussion about the risks of self-representation and its inquiry regarding [his] competence." *Chaaban II, supra* at ___.

Specifically, the Court of Appeals noted:

> "Defendant Chaaban went from certainty when he stated that he 'could defend [him]self with the truth' to a probability that he 'could probably effectively handle [him]self' during trial. Defendant Chaaban then finally concluded, at the close of the exchange with the trial court, '[w]ell, I don't know what to do." *Chaaban II, supra* at ___.

Where the defendant never expressly stated that he wished to represent himself, the trial court denied the defendant's request for substitute counsel or the opportunity to retain counsel, the defendant represented himself with standby counsel at important pretrial hearings and during jury voir dire, and the defendant did not expressly waive his right to counsel until immediately before trial, the defendant was effectively denied counsel at critical stages of the criminal proceedings against him, and his conviction was reversed. *People v Willing*, 267 Mich App 208, 220–23 (2005).

A defendant's waiver of counsel may be voluntary and unequivocal even when the defendant admitted "[he] would rather not represent [him]self" but

decided to do so because *pro se* representation provided him with greater access to police reports and other information not otherwise available to him when he was represented by counsel. *Jones v Jamrog*, 414 F3d 585, 592 (CA 6, 2005).

> "In this case, [the defendant] considered his circumstances and decided that 'in his particular case counsel [was not] to his advantage.' *Faretta*, *supra*, at 835. In accordance with its discovery policy, the state refused to turn over police reports to him, instead providing them only to his attorney. [The defendant] was able to review the reports and discuss them with his attorney, but only when his attorney was available to do so and only for as long as the attorney had time. Consequently, the state's discovery policy presented [the defendant] with a real-world obstacle that he had no choice but to negotiate. The approach he selected was to forgo his right to counsel in order that he might have more time to review the police reports and do counter-investigative work in preparation for his defense at trial. The mere fact that this approach had an obvious and significant cost—the relinquishment of a lawyer's assistance—does not mean that [the defendant's] decision to pursue the approach was involuntary." *Jones, supra* at 592.

A defendant's failure to object before or during trial to a district court's denial of adequate opportunity to secure an attorney for a preliminary examination serves to waive the right to counsel at the examination. In *People v Winfrey*, 41 Mich App 139, 145 (1972), the Court of Appeals determined that, although the district court had not provided defendant adequate opportunity to secure counsel for the preliminary examination, the circuit court provided such an opportunity at arraignment, which defendant declined to take advantage of: "Defendant's failure to object, prior to or during trial, to the district court's error to secure counsel for his preliminary examination constituted a waiver thereof." *Id*. at 145.

Prior consultation with a private attorney does not establish a knowing and intelligent waiver of the right to counsel on the record at a preliminary examination. *People v Carter*, 101 Mich App 529, 534 (1980).* A judge may, without violating defendant's Sixth Amendment right to self-representation, appoint standby counsel over defendant's objection for the purpose of advising defendant on courtroom protocol or assisting defendant in overcoming routine obstacles in pursuit of defendant's goals. *McKaskle v Wiggins*, 465 US 168, 184 (1984). Where advisory counsel is requested by defendant, the trial court is under no obligation to grant it because there is no substantive right to such counsel. The presence of standby counsel is not an exception to the requirements of *Anderson*, *supra*, or the pertinent court rules relating to waiver of counsel. *People v Dennany*, 445 Mich 412, 446 (1994). The presence of standby counsel does not legitimize a waiver-of-counsel inquiry not comporting with legal standards. In *People v Lane*, 453 Mich 132, 138-139 (1996), the Michigan Supreme Court overruled *People v Riley*, 156 Mich App 396 (1986), which held that appointment of advisory counsel sufficed to inform defendant of the right to counsel.

*The Michigan Supreme Court, in lieu of granting leave to appeal, remanded this case to the circuit court to determine, for purposes of the harmless error rule, whether defendant suffered any prejudice from the absence of a lawyer at the preliminary examination. *People v Carter*, 412 Mich 214, 218 (1981).

If a juvenile in an "automatic waiver" case has waived the right to an attorney, the court at later proceedings must reaffirm that the juvenile continues to desire to proceed without being represented by an attorney. MCR 6.905(A).

MCR 6.905(C) provides an extra safeguard for juveniles who request waiver of the right to counsel: it predicates such waiver on the appointment of counsel to advise on the waiver issue and to assist such juveniles at later proceedings. Under MCR 6.905(C), the magistrate or court may permit waiver of the right to counsel if:

> "(1) an attorney is appointed to give the juvenile advice on the question of waiver;
>
> "(2) the magistrate or court finds that the juvenile is literate and competent to conduct a defense;
>
> "(3) the magistrate or court advises the juvenile of the dangers and disadvantages of self-representation;
>
> "(4) the magistrate or court finds on the record that the waiver is voluntarily and understandingly made; and
>
> "(5) the court appoints standby counsel to assist the juvenile at trial and at the juvenile sentencing hearing."

5.13 Advice at Preliminary Examinations and Subsequent Proceedings

Before the court begins a preliminary examination, it must readvise a defendant who has waived counsel of the right to counsel as set forth in MCR 6.005(E):

> **"(E) Advice at Subsequent Proceedings.** If a defendant has waived the assistance of a lawyer, the record of each subsequent proceeding (e.g., preliminary examination . . .) need show only that the court advised the defendant of the continuing right to a lawyer's assistance (at public expense if the defendant is indigent) and that the defendant waived that right. Before the court begins such proceedings,
>
> > "(1) the defendant must reaffirm that a lawyer's assistance is not wanted; or
> >
> > "(2) if the defendant requests a lawyer and is financially unable to retain one, the court must appoint one; or
> >
> > "(3) if the defendant wants to retain a lawyer and has the financial ability to do so, the court must allow the defendant a reasonable opportunity to retain one.
>
> "The court may refuse to adjourn a proceeding to appoint counsel or allow a defendant to retain counsel if an adjournment would significantly prejudice the prosecution, and the defendant has not been reasonably diligent in seeking counsel."

*See Section 5.12 for discussion of the *Anderson* requirements.

The requirements of 6.005(E) are met by the "judge telling the defendant that in the upcoming proceeding he has the right to an attorney, at public expense if necessary, and asking the defendant whether he wishes to have an attorney or continue to represent himself." *People v Lane*, 453 Mich 132, 137 (1996). Where the defendant does not understand the options available and the disadvantages of each option, the court should apply the requirements articulated by the Michigan Supreme Court in *People v Anderson*, 398 Mich 361, 367-368 (1976),* before obtaining a waiver of, or granting a request for, counsel. *Lane*, *supra*.

5.14 Determination of Indigency for Purposes of Appointing Counsel

If the court determines that the defendant is financially unable to retain a lawyer, it must promptly appoint a lawyer and promptly notify the lawyer of the appointment. MCR 6.005(D). Indigency is determined according to MCR 6.005(B), which states as follows:

> **"(B) Questioning Defendant About Indigency.** If the defendant requests a lawyer and claims financial inability to retain one, the court must determine whether the defendant is indigent. The determination of indigency must be guided by the following factors:
>
> > "(1) present employment, earning capacity and living expenses;
> >
> > "(2) outstanding debts and liabilities, secured and unsecured;
> >
> > "(3) whether the defendant has qualified for and is receiving any form of public assistance;
> >
> > "(4) availability and convertibility, without undue financial hardship to the defendant and the defendant's dependents, of any personal or real property owned; and
> >
> > "(5) any other circumstances that would impair the ability to pay a lawyer's fee as would ordinarily be required to retain competent counsel.
>
> "The ability to post bond for pretrial release does not make the defendant ineligible for appointment of a lawyer."

Indigence is to be determined by consideration of the defendant's financial ability, not that of the defendant's friends and relatives. *People v Arquette,* 202 Mich App 227, 230 (1993).

MCR 6.005(C) provides that "[i]f a defendant is able to pay part of the cost of a lawyer, the court may require contribution to the cost of providing a lawyer and may establish a plan for collecting the contribution. In juvenile cases, MCR 6.905(D) provides:

> **"(D) Cost.** The court may assess cost of legal representation, or part thereof, against the juvenile or against a person responsible for the support of the juvenile, or both. The order assessing cost shall not be binding on a person responsible for the support of the juvenile unless an opportunity for a hearing has been given and until a copy of the order is served on the person, personally or by first class mail, to the person's last known address."

5.15 Multiple Representation and Conflicts of Interest

MCR 6.005(F) states:

> **"(F) Multiple Representation.** When two or more indigent defendants are jointly charged with an offense or offenses or their cases are otherwise joined, the court must appoint separate lawyers unassociated in the practice of law for each defendant. Whenever two or more defendants who have been jointly charged or whose cases have been joined are represented by the same retained lawyer or lawyers associated in the practice of law, the court must inquire into the potential for a conflict of interest that might jeopardize the right of each defendant to the undivided loyalty of the lawyer. The court may not permit the joint representation unless:
>
> > "(1) the lawyer or lawyers state on the record the reasons for believing that joint representation in all probability will not cause a conflict of interests;
> >
> > "(2) the defendants state on the record after the court's inquiry and the lawyer's statement, that they desire to proceed with the same lawyer; and
> >
> > "(3) the court finds on the record that joint representation in all probability will not cause a conflict of interest and states its reasons for the finding."

The disparate treatment of indigent and nonindigent defendants under MCR 6.005(F) does not violate the equal protection clause of the constitution. *People v Portillo*, 241 Mich App 540, 542-543 (2000).

In joint representation cases, the court should inquire into any potential conflict of interest that becomes apparent and take such action as the interests of justice require. In addition, attorneys must immediately inform the court of a conflict of interest that may arise at any time. If the court agrees that a conflict has arisen, it must afford one or more of the defendants the opportunity to retain separate lawyers. MCR 6.005(G).

5.16 Waivers of Preliminary Examinations

An individual charged with a "felony" must either proceed with or waive a preliminary examination before an information can be filed.* MCL 767.42(1) and MCR 6.112(B). A "felony" is defined under MCL 761.1(g) as "a violation of a penal law of this state for which the offender, upon conviction, may be punished by death or by imprisonment for more than 1 year or an offense expressly designated by law to be a felony." Because both the prosecution and defense are entitled to a preliminary examination in a "felony" case, the court must not allow waiver of the examination unless both parties agree to such a a waiver. MCR 6.110(A) and *People v Wilcox*, 303 Mich 287, 295-296 (1942).

*However, an information may be filed without a preliminary examination against a fugitive from justice. See Section 5.6(D) for more information on this exception.

If the court permits the defendant to waive the preliminary examination, it must bind the defendant over for trial on the charge or charges set forth in the complaint or amended complaint. MCR 6.110(A). A written waiver is not required. *People v Losinger*, 331 Mich 490, 497 (1951).

A. Waivers of Examinations Without Counsel and Remands for Examinations

MCL 767.42(1) provides, in part:

> "If any person waives his statutory right to a preliminary examination without having had the benefit of counsel at the time and place of the waiver, upon proper and timely application by the person or his counsel, before trial or plea of guilty, the court having jurisdiction of the cause, in its discretion, may remand the case to a magistrate for a preliminary examination."

If a defendant waives the preliminary examination without benefit of counsel, the court must determine that the waiver is freely, understandingly, and voluntarily given before accepting it. MCR 6.610(H).*

*Waiver of counsel is discussed in Section 5.12.

It is an abuse of discretion to deny a defendant's motion to remand for a preliminary examination under MCL 767.42(1) where defendant waived the examination without benefit of counsel and the court denied the motion based upon defendant's previous adjournments of trial. *People v Wiggins*, 6 Mich App 340, 343 (1967). But see *People v Johnson*, 57 Mich App 117, 121-122 (1974), where the Court of Appeals found no abuse of discretion by the trial court in denying defendant's motion to remand for a preliminary examination when (1) the defendant demonstrated no prejudice resulting from the denial; and (2) the trial court found that, even though defendant waived his preliminary examination without counsel, defendant was aware of his right to examination and counsel by virtue of three previous arraignments on other charges.

B. Remands Related to Refiled and Added Charges

When a felony charge is dismissed and refiled after a defendant has been bound over, the right to a second examination on the refiled charge will be deemed waived if the defendant does not dispute the sufficiency of the evidence presented at the first examination.

In *People v Jones*, 195 Mich App 65, 68 (1992), the defendant was bound over on charges of breaking and entering an occupied dwelling with the intent to commit larceny, and larceny with safe damage. On the day of trial, the trial court granted the prosecutor's motion to dismiss without prejudice because a key prosecution witness could not be located. The same charges were refiled that day, and at the second preliminary examination the defendant, even

though he conceded that the evidence to be presented at the second examination would be no different than the evidence presented at the first examination, moved to quash the information unless the prosecutor presented new evidence. The district court, finding no reason to hold another examination, bound defendant over again on the same charges. On appeal, defendant claimed that the trial court did not have jurisdiction since he was denied a preliminary examination. The Court of Appeals found that defendant waived his right to a preliminary examination when he did not dispute the sufficiency of the evidence for bindover at the first examination and did not object until appeal to the failure to provide the second examination: "[T]he statute [MCL 767.42(1)] gives the defendant the right to a preliminary examination for the felony with which he was charged. That is precisely what defendant had."

In *People v Skowronek*, 57 Mich App 110, 113-115 (1974), the Court of Appeals upheld the trial court's refusal to remand for a preliminary examination where defendant waived examination when the charges were first brought but sought examination after the same charges were dismissed and refiled more than a year later, following the circuit court's grant of a new trial. The Court of Appeals rejected defendant's arguments that he be allowed to retract his waiver of the first examination because it was part of a plea bargain. It also rejected his argument that his retained attorney for the second trial needed the examination to prepare an adequate defense. However, the Court indicated that allowing defendant to withdraw his waiver "would not have greatly inconvenienced the judicial system under the circumstances of this case . . . , and that it would have been better to do so." *Id*. at 115.

It is not an abuse of discretion to deny a motion to remand for a preliminary examination on a charge added at the end of a first examination if the added charge is supported by testimony at the first examination, and the defense would not have altered its questioning because of the new charge. *People v Hunt*, 442 Mich 359, 364 (1993), and *People v Forston*, 202 Mich App 13, 16-17 (1993).

It is error to deny a motion to remand for preliminary examination on added charges if the prosecutor admitted to a lack of evidence supporting the bindover on those added charges. *People v Erskin*, 92 Mich App 630, 641 (1979). However, in *Erskin* the error was harmless where defendant later took the stand at trial and admitted guilt in relation to those added charges.

C. Waiving the Right to Preliminary Examination by Entering a Plea to the Information

A plea of guilty or nolo contendre upon arraignment on an information in the circuit court waives a preliminary examination. *People v McKinley*, 32 Mich App 178, 179 (1971), and *People v Losinger*, 330 Mich 490, 497 (1951).

A defendant is deemed to have waived a preliminary examination if he or she fails to object before appeal to the lack of an examination and stands mute at

the arraignment on the information. *People v Alexander*, 72 Mich App 91, 98 (1976).

D. Waiver of Examinations by Juveniles

A juvenile may waive a preliminary examination if the juvenile is represented by an attorney, and the waiver is made and signed by the juvenile in open court. MCR 6.911(A). The magistrate must find and place on the record that the waiver was freely, understandingly, and voluntarily given. *Id*.

E. Amending the Information to Add New Offense After Waiver of Preliminary Examination

When a defendant waives the right to a preliminary examination and the magistrate files the return, the prosecutor has authority to file an information against the defendant. Once the information is filed, the circuit court has jurisdiction over the defendant and the case, and the court may amend the information at any time "unless the proposed amendment would unfairly surprise or prejudice the defendant." MCR 6.112(H); *People v McGee*, 258 Mich App 683, 696 (2003).

The Michigan Court of Appeals concluded that the prosecution's motion to amend the information on the first day of the defendant's trial supported the defendant's claim of surprise, but the defendant failed to show that she suffered any actual prejudice as a result. *Id*. at 696. In the absence of any *unfair* surprise or prejudice, the trial court did not abuse its discretion in permitting the amendment of the information to add the charge for which the defendant was ultimately convicted. *Id*.

5.17 Discovery Before or at Preliminary Examinations

Discovery in felony cases is governed by MCR 6.201. Administrative Order No. 1999-3, 459 Mich cxc (1999). The rule supercedes MCL 767.94a, a discovery statute, as directed by Administrative Order No. 1994-10, 447 Mich cxiv (1994).

A defendant may seek discovery before a preliminary examination in the interest of receiving a fair trial. Discovery may include inadmissible evidence if it aids the defendant in trial preparation. A defendant has a due process right to obtain evidence in the possession of the prosecutor if it is favorable to the defendant and material to guilt or innocence. *People v Laws*, 218 Mich App 447, 452 (1996).

MCR 6.201(D) allows a party to excise nondiscoverable material, but it requires the party to inform the other party that excised material has been withheld. On motion, the court must hold an in camera inspection to determine whether the reasons for excision are justifiable. If the court upholds

the excision, it must seal and preserve the record of the hearing in event of appeal.

MCR 6.201(E) governs protective orders, which a court may enter on motion and a showing of good cause. The court shall "consider the parties' interests in a fair trial; the risk to any person of harm, undue annoyance, intimidation, embarrassment, or threats; the risk that evidence will be fabricated; and the need for secrecy regarding the identity of informants or other law enforcement matters. On motion, with notice to the other party, the court may permit the showing of good cause for a protective order to be made in camera. If the court grants a protective order, it must seal and preserve the record of the hearing for review in the event of an appeal."

Unless otherwise ordered by the court, a prosecutor must comply with the requirements of MCR 6.201 within 21 days of a request made under the rule. MCR 6.201(F). A defendant must comply within 21 days. *Id*.

MCR 6.201(J) states:

> **"(J) Violation.** If a party fails to comply with this rule, the court, in its discretion, may order the party to provide the discovery or permit the inspection of materials not previously disclosed, grant a continuance, prohibit the party from introducing in evidence the material not disclosed, or enter such other order as it deems just under the circumstances. Parties are encouraged to bring questions of noncompliance before the court at the earliest opportunity. Wilful violation by counsel of an applicable discovery rule or an order issued pursuant thereto may subject counsel to appropriate sanctions by the court. An order of the court under this section is reviewable only for abuse of discretion."

A. Mandatory Disclosure

MCR 6.201(A) identifies discovery materials that must be disclosed upon request to all parties. This rule applies to materials to be used in anticipation of trial. The Court of Appeals in *Laws*, *supra*, having determined that discovery is permissible at preliminary examinations, noted the restrictions on district court discretion imposed by MCR 6.201(A). It then determined that the district court retains discretion to order an in camera review of police reports sought by defendant pursuant to a preliminary examination. *Laws, supra* at 455-456.

MCR 6.201(A) states:

> **"(A) Mandatory Disclosure.** In addition to disclosures required by provisions of law other than MCL 767.94a, a party upon request must provide all other parties:

> "(1) the names and addresses of all lay and expert witnesses whom the party may call at trial; in the alternative, a party may provide the name of the witness and make the witness available to the other party for interview; the witness list may be amended without leave of the court no later than 28 days before trial;
>
> "(2) any written or recorded statement pertaining to the case by a lay witness whom the party may call at trial, except that a defendant is not obliged to provide the defendant's own statement;
>
> "(3) the curriculum vitae of an expert the party may call at trial and either a report by the expert or a written description of the substance of the proposed testimony of the expert, the expert's opinion, and the underlying basis of that opinion;
>
> "(4) any criminal record that the party may use at trial to impeach a witness;
>
> "(5) a description or list of criminal convictions, known to the defense attorney or prosecuting attorney, of any witness whom the party may call at trial; and
>
> "(6) a description of and an opportunity to inspect any tangible physical evidence that the party may introduce at trial, including any document, photograph, or other paper, with copies to be provided on request. A party may request a hearing regarding any question of costs of reproduction. On good cause shown, the court may order that a party be given the opportunity to test without destruction any tangible physical evidence."

MCR 6.201(A) may preclude discovery of an attorney's witness interview notes. *People v Holtzman*, 234 Mich App 166, 178-179 (1999). In *Holtzman*, the Court of Appeals determined that such notes do not qualify as a "statement by a lay witness" under MCR 6.201(A)(2). The Court stated that "[u]nless the 'notes' were a 'substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded,' or unless the witness signed or adopted the notes as his or her statement, they are not subject to disclosure under MCR 6.201(A)(2)." *Holtzman, supra* at 179. The Court applied the definition of "statement" provided in MCR 2.302(B)(3)(c), citing as authority MCR 6.001(D) relating to the applicability of civil rules in criminal cases. The Court also determined that the witness interview notes involved in the case were protected by Michigan's "work product privilege." *Id*. at 185.*

*See Section 5.17(C), below, for further information on the "work product" privilege.

In *In re Bay County Pros*, 109 Mich App 476, 484-486 (1981), a case predating MCR 6.201, the Court of Appeals condemned the prosecutor's policy of refusing to provide a copy of police reports to defendants, finding that it was not sufficient for the prosecutor to read the reports to defense

counsel, or to let counsel see them in the courtroom at the time of the preliminary examination. The court said that full disclosure required providing copies of the reports. See also *Harbor Springs v McNabb*, 150 Mich App 583, 586 (1986), in which the Court of Appeals determined that fundamental fairness required defendants to have copies of the initial police report involved in the case in order to prepare a defense.

B. Discovery of Information Known to Prosecuting Attorney

Upon request, under MCR 6.201(B), the prosecuting attorney must provide each defendant:

> "(1) any exculpatory information or evidence known to the prosecuting attorney;
>
> "(2) any police report and interrogation records* concerning the case, except so much of a report as concerns a continuing investigation;
>
> "(3)Any written or recorded statements by a defendant, codefendant, or accomplice pertaining to the case, even if that person is not a prospective witness at trial;
>
> "(4) any affidavit, warrant, and return pertaining to a search or seizure in connection with the case; and
>
> "(5) any plea agreement, grant of immunity, or other agreement for testimony in connection with the case."

*Effective January 1, 2006, interrogation records were added to this court rule.

In *People v Pruitt*, 229 Mich App 82, 84 (1998), the Court of Appeals held that a district court has the authority in felony cases to order, before a preliminary examination, the discovery of statements "made by a defendant, codefendant, or accomplice in response to an investigative subpoena, along with any exculpatory information obtained from any witness in response to an investigative subpoena." However, the Court precluded district courts in felony cases from ordering the discovery of "nonexculpatory statements made by other subpoenaed individuals."

C. Prohibited Discovery

MCR 6.201(C) prohibits discovery of evidence protected by constitution, statute, or privilege. "If a defendant demonstrates a good-faith belief, grounded in articulable fact, that there is a reasonable probability that records protected by privilege are likely to contain material information necessary to the defense, the trial court shall conduct an *in camera* inspection of the records." MCR 6.201(C)(2). The remainder of MCR 6.201(C) details the possible outcomes of such inspection and the routes for appeal of the court's

decision to suppress or make available a privilege holder's testimony. MCR 6.201(C)(2)(a)-(e) state:

> "(a) If the privilege is absolute, and the privilege holder refuses to waive the privilege to permit an *in camera* inspection, the trial court shall suppress or strike the privilege holder's testimony.
>
> "(b) If the court is satisfied, following an *in camera* inspection, that the records reveal evidence necessary to the defense, the court shall direct that such evidence as is necessary to the defense be made available to defense counsel. If the privilege is absolute and the privilege holder refuses to waive the privilege to permit disclosure, the trial court shall suppress or strike the privilege holder's testimony.
>
> "(c) Regardless of whether the court determines that the records should be made available to the defense, the court shall make findings sufficient to facilitate meaningful appellate review.
>
> "(d) The court shall seal and preserve the records for review in the event of an appeal.
>
> > "(i) by the defendant, on an interlocutory basis or following conviction, if the court determines that the records should not be made available to the defense, or
> >
> > "(ii) by the prosecution, on an interlocutory basis, if the court determines that the records should be made available to the defense.
>
> "(e) Records disclosed under this rule shall remain in the exclusive custody of counsel for the parties, shall be used only for the limited purpose approved by the court, and shall be subject to such other terms and conditions as the court may provide."

MCR 6.201(C) implicitly incorporates the common law "work product" privilege. *People v Holtzman*, 234 Mich App 166, 181 (1999). Attorney witness interview notes are thereby protected from disclosure that would otherwise violate MCR 2.302(B)(3)(a), the civil work-product rule that shields from discovery the "mental impressions, conclusions, opinions, or legal theories of an attorney." The Court noted that the work-product privilege applies through MCR 6.201(C) to the prosecutor's work product in criminal proceedings. *Holtzman, supra* at 181, citing *Messenger v Ingham County Pros*, 232 Mich App 633, 640 (1998), and *People v Gilmore*, 222 Mich App 442, 453 (1997). MCR 6.201(C)(1) states in part that "[n]otwithstanding any other provision of this rule, there is no right to discover information or

evidence that is protected from disclosure by constitution, statute, or privilege."

The Court in *Holtzman*, *supra,* determined that a prosecutor's witness interview notes fit the definition of work product set forth in *Gilmore*, which held that the privilege protected a prosecutor's disposition record sought by a defendant for a complaint against a park ranger. *Holtzman, supra* at 182, citing *Gilmore*, *supra* at 454-456. *Holtzman* and *Gilmore* relied on the definition of work product and the rationale for the privilege contained in *Hickman v Taylor*, 329 US 495, 511 (1947). The Court in *Holtzman* concluded that a prosecutor's witness interview notes that do not meet the definition of "statement" under MCR 2.302 are protected by Michigan's work-product privilege. *Holtzman, supra* at 185.

D. Timing, Copies, Continuing Duty to Disclose, and Modification

MCR 6.201(G) states that a party's obligation to provide a photograph or paper of any kind is satisfied by providing a clear copy.

MCR 6.201(H) requires a party to promptly disclose to the other party additional information or material subject to disclosure under the rule at any time it is discovered without further request.

MCR 6.201(I) enables a court to modify the requirements and prohibitions of MCR 6.201 on good cause shown. In *People v Phillips*, 246 Mich App 201 (2001), the Court of Appeals determined that the admissibility of expert witness testimony at trial is within the trial court's discretion. *Id*. at 203, citing *People v Smith*, 425 Mich 98, 106 (1986). The Court determined that the trial court had abused its discretion in compelling defendant to create for discovery purposes expert witness reports. The Court noted that the trial court cast its order as discretionary, rather than relying on the good cause requirement of MCR 6.201(I). The Michigan Supreme Court subsequently remanded the case to the circuit court for a good cause showing under the rule.

In *People v Davie (After Remand)*, 225 Mich App 592 (1997), the Court of Appeals, citing MCR 6.201(I), determined that a district court's dismissal of charges against defendants for the prosecutor's failure to provide discovery materials before trial was without prejudice. The Court noted that "dismissal for failure to comply with the court rules is presumed to be a dismissal with prejudice." *Id*. at 600, citing MCR 2.504(B), a court rule pertaining to involuntary dismissal in civil actions. It also noted that a trial court speaks through its orders. The dismissal order in *Davie (After Remand)* did not indicate whether it was with or without prejudice. The Court of Appeals determined that because of the parties' reliance on an informal discovery process in Detroit Recorder's Court, it would be unfair to preclude the prosecutor from refiling charges. *Id*.

5.18 Venue for Preliminary Examinations

A. Venue Generally

Venue for preliminary examinations is determined by statute. For criminal actions in **first-class districts**, the proper venue is the county where the violation took place. MCL 600.8312(1). "First-class district" is defined as a district consisting of one or more counties, in which each county is responsible for maintaining, financing, and operating the district court within its respective county. MCL 600.8103(1).

For criminal actions in **second-class districts**, the proper venue is in the district where the violation took place. MCL 600.8312(2). "Second-class district" is defined as a district consisting of a group of political subdivisions within a county, in which the county is responsible for maintaining, financing, and operating the district court. MCL 600.8103(2).

For criminal actions in **third-class districts**, the proper venue is in the political subdivision where the violation took place, except that when the violation occurs in a political subdivision where the court is not required to sit, venue is proper in any political subdivision within the district where the court is required to sit. MCL 600.8312(3). "Third class district" is defined as a district consisting of one or more political subdivisions within a county, in which each political subdivision is responsible for maintaining, financing, and operating the district court within its political subdivision. MCL 600.8103(3).

Special provisions apply to preliminary examinations where a criminal action occurs on a political boundary, or in transit across borders. MCL 762.3(3) provides:

> "(a) If an offense is committed on the boundary of 2 or more counties, districts or political subdivisions or within 1 mile thereof, venue is proper in any of the counties, districts or political subdivisions concerned.
>
> "(b) If an offense is committed in or upon any railroad train, automobile, aircraft, vessel or other conveyance in transit, and it cannot readily be determined in which county, district or political subdivision the offense was committed, venue is proper in any county, district or political subdivision through or over which the conveyance passed in the course of its journey."

Under MCL 762.3(3)(c), the attorney general may designate venue where it appears to the attorney general that an alleged state offense was committed within the state but its locality is otherwise impossible to determine.

Certain statutes establish venue for offenses that may involve more than one location. See, e.g., MCL 762.8 (felony resulting from two or more acts), MCL 762.10 (embezzlement), and MCL 762.10c (identity theft).

B. Failure to Establish Venue

A failure to establish venue at a preliminary examination, followed by timely challenge to bindover on venue grounds, deprives the trial court of the ability to hold defendant to trial. *People v Hall,* 375 Mich 187, 192 (1965), and *People v Sutton*, 36 Mich App 604, 606 (1971).

No verdict will be set aside or a new trial granted by reason of failure to prove that the offense was committed in the county or within the jurisdiction of the court unless the accused raises the issue before the case is submitted to the jury. MCL 767.45(1)(c).

C. Sufficiency of Evidence to Prove Venue

A court may take judicial notice of the location of a political subdivision where such location was not proven at a preliminary examination. In *People v Smith*, 28 Mich App 656, 657-658 (1974), the Court of Appeals determined that the trial court properly took judicial notice of the fact that the city of Taylor, the site of the offense, is located in Wayne County, the proper venue for the case, though such evidence was not offered at the examination.

A voluntary statement given to a police officer that discloses the location of a homicide is sufficient to prove venue when presented as evidence at a preliminary examination, even though a similar statement to another officer is suppressed because it was in response to the second officer's question. *People v Cronk*, 15 Mich App 309, 314 (1969).

D. Change of Venue

A district court has no authority to grant a motion for change of venue before a preliminary examination is held. In *In re Attorney General*, 129 Mich App 128, 131-32 (1983), the Court of Appeals determined that MCL 762.7, the statute granting courts of record authority to change venue in criminal cases, applies only to circuit courts in felony cases.

5.19 Orders for Competency Evaluations at Preliminary Examinations

A defendant must be competent to stand trial or plead guilty before the state can proceed against the defendant. MCL 330.2022(1) and *People v Kline*, 113 Mich App 733, 738 (1982).

MCR 6.125(B) provides ample opportunity to raise the competency issue. Any court, including district court, may raise the issue as long as proceedings against the defendant are pending or being held before it. The issue can be raised at any time during proceedings and may be raised by the court or by motion of a party. See also the 1989 Staff Comment to MCR 6.125(B).

The United States Supreme Court in *Drope v Missouri*, 420 US 162, 177 n 13, 180 (1975), provided three factors to consider in determining when the competency issue should be further explored:

- An expressed doubt by counsel concerning a client's competency although a court is not required to accept such representations without question.
- Evidence of defendant's irrational behavior and demeanor at trial.
- Prior medical opinion regarding the defendant's competency to stand trial.

See also *Owens v Sowder*, 661 F2d 584, 586-587 (CA 6, 1981) (defense counsel did not document prior psychiatric problems and defendant's behavior did not suggest need for examination). Additionally, in *People v Whyte*, 165 Mich App 409, 413 (1988), the Court of Appeals held that a presentence investigation report containing the defendant's extensive history of mental illness, when disclosed to the trial court, satisfied the requisite showing that defendant may have been incompetent to plead guilty.

Upon a showing that defendant may be incompetent to stand trial, the court must order the defendant to undergo a forensic examination. MCR 6.125(C)(1) and MCL 330.2026(1). In *People v Thomas*, 96 Mich App 210, 218 (1980), the Court of Appeals established the following procedure:

> "[W]here there is evidence of incompetency prior to the preliminary examination and counsel for defendant requests a determination of competency to stand trial, the examining magistrate should halt preliminary proceedings against a defendant and refer the defendant to the Center for Forensic Psychiatry for evaluation and recommendation. Upon receipt of the written report and recommendation, the district judge should conduct a hearing and make a determination of competency."

*For further information on requests for competency determinations, see Monograph 6: *Pretrial Motions—Third Edition* (MJI, 2006), Section 6.14.

In *People v Hall*, 97 Mich App 143, 145 (1980), rev'd on other grounds 418 Mich 189 (1983), defense counsel raised the issue of the defendant's competence before the preliminary examination. A preliminary examination was conducted, but the parties agreed to delay the bindover determination until the results of the defendant's competency examination were returned. The results initially showed defendant to be incompetent. However, later results showed defendant to be competent to stand trial. After the defendant was found competent to stand trial, he was bound over to circuit court and pled guilty to second-degree murder. On appeal, the Court of Appeals agreed that the defendant had not been provided a valid preliminary examination because he was found incompetent at the time of the examination. However, the Court found that the defendant waived his right to preliminary examination by pleading guilty to the charged offense in the circuit court. *Id.* at 147.*

5.20 Limitations on Film or Electronic Media Coverage in Courtrooms

By Administrative Order No. 1989-1, 432 Mich cxii (1989), the Michigan Supreme Court ruled that film or electronic media coverage is permitted in all Michigan courts. With limited exceptions, requests for film or electronic media coverage must be allowed if the requests are made at least three business days before the beginning of the proceeding to be filmed. *Id.* at Part 2(a).

The administrative order authorizes a court to terminate, suspend, limit, or exclude film or electronic media coverage at any time upon a finding that the fair administration of justice requires such action, or that rules established under the administrative order or additional rules imposed by the judge have been violated. This decision is not appealable. Also, the judge has sole discretion to exclude coverage of certain witnesses, including but not limited to the victims of sex crimes and their families, police informants, undercover agents, and relocated witnesses. *Id.* at Part 2(b), (d). The judge may require members of the media to make pooling arrangements on their own and, in the absence of such arrangements, to bar media coverage. *Id.* at Part 4(d).

5.21 Closure of Preliminary Examinations to Members of the Public

The public has a qualified right of access to preliminary hearings. The right may be limited to serve the interests of justice. *Press-Enterprise Co v Superior Court*, 478 US 1, 10-12 (1986). A magistrate may close a preliminary examination to the public if it involves a statutorily delineated sex offense, or to protect the right of a party to a fair trial. MCL 766.9.

Under MCL 766.9(1), a magistrate has the discretion to close to the public a preliminary examination of a person charged with any of the following offenses:

- Criminal sexual conduct in any degree.
- Assault with intent to commit criminal sexual conduct.
- Sodomy.
- Gross indecency.
- Any other offense involving sexual misconduct.

To close a preliminary examination to the public, the following conditions must be met under MCL 766.9(1)(a)-(c):

- The magistrate determines that the need for protection of a victim, witness, or defendant outweighs the public's right of access.
- The denial of access is narrowly tailored to the interest being protected.
- The magistrate states on the record the specific reasons for closing the preliminary examination to the public.

To determine whether closure of the preliminary examination is necessary to protect a victim or witness, the court must consider:

> "(a) The psychological condition of the victim or witness.
>
> "(b) The nature of the offense charged against the defendant.
>
> "(c) The desire of the victim or witness to have the examination closed to the public." MCL 766.9(2).

In narrowly tailoring closure to accommodate the interests of a victim testifying about sensitive matters, the magistrate should only close those portions of the examination in which such matters are discussed. *In re Closure of Prelim Exam (People v Jones)*, 200 Mich App 566, 569-570 (1993).

A court may close a preliminary examination to protect the right of a party to a fair trial only if both of the following apply:

> "(a) There is a substantial probability that the party's right to a fair trial will be prejudiced by publicity that closure would prevent.
>
> "(b) Reasonable alternatives to closure cannot adequately protect the party's right to a fair trial." MCL 766.9(3).

MCR 8.116(D) provides:

> "(1) Except as otherwise provided by statute or court rule, a court may not limit access by the public to a court proceeding unless
>
> > "(a) a party has filed a written motion that identifies the specific interest to be protected, or the court *sua sponte* has identified a specific interest to be protected, and the court determines that the interest outweighs the right of access;
> >
> > "(b) the denial of access is narrowly tailored to accommodate the interest to be protected, and there is no less restrictive means to adequately and effectively protect the interest; and
> >
> > "(c) the court states on the record the specific reasons for the decision to limit access to the proceeding.
>
> "(2) Any person may file a motion to set aside an order that limits access to a court proceeding under this rule, or an objection to entry of such an order. MCR 2.119 governs the proceedings on such a motion or objection. If the court denies the motion or objection, the moving or objecting person may file an application for leave to appeal in the same manner as a party to the action.
>
> "(3) Whenever the court enters an order limiting access to a proceeding that otherwise would be public, the court must forward a copy of the order to the State Court Administrative Office."

*MCL 750.520b-750.520g.

In cases involving a charge of criminal sexual conduct,* upon request of counsel, the victim, or the defendant, the magistrate must order the suppression of the names of the victim and actor, including the details of the alleged offense, "until such time as the [defendant] is arraigned on the information, the charge is dismissed, or the case is otherwise concluded, whichever occurs first." MCL 750.520k.

5.22 Sequestration of Witnesses

The magistrate conducting a preliminary examination may exclude from the courtroom all witnesses who have not been examined and may direct the witnesses to be kept separate so that they cannot converse with each other until after they have been examined. MCL 766.10. The decision to sequester a witness is a matter of discretion for the court. *People v Cutler*, 73 Mich App 313, 315 (1977), and *People v Hill*, 88 Mich App 50, 65 (1979).

Generally, a timely request to sequester a witness should not be denied, except where the witness is the investigating police officer. *People v Hayden,* 125 Mich App 650, 659 (1983). In *People v Cyr*, 113 Mich App 213, 231 (1982),

the Court of Appeals found that the judge did not err by allowing an unsequestered police officer witness to testify at the preliminary examination despite the judge's previous sequestration order. The Court found no prejudice to defendant because the officer's testimony addressed a different pre-arrest conversation with defendant than a previous witness had testified about.

Crime victims have a constitutional right to attend all proceedings the accused has a right to attend. Const 1963, art 1, § 24. In cases under the felony article of the Crime Victim's Rights Act (CVRA), MCL 780.751 et seq., crime victims have the explicit statutory right to attend the entire *trial* of the defendant, but with one significant limitation: they may be sequestered until they "first" testify. MCL 780.761. This statute, because of its use of the word "trial," presumably does not apply to preliminary examinations. However, another statute and a rule of evidence provide the court general authority to sequester *witnesses*, which presumably includes the authority to sequester victims before or after testifying at preliminary examinations. MCL 600.1420 gives the court authority to sequester witnesses to discourage collusion. This statute allows the court, for good cause shown, to exclude witnesses from the courtroom when they are not testifying. Additionally, MRE 615 allows the court to exclude nonparty witnesses from the courtroom at the request of a party, or on its own motion. Thus, under MCL 600.1420 and MRE 615, the court presumably retains discretion to sequester a victim after he or she first testifies.

Under MRE 615, the court must not exclude "a person whose presence is shown by a party to be essential to the presentation of the party's cause." This exception normally applies in criminal cases to law enforcement personnel assisting the prosecuting attorney with the presentation of evidence, and it may apply to victim "support persons." See *People v Jehnson,* 183 Mich App 305, 308 (1990). See also *Walker v State*, 208 SE 2d 350 (Ga App, 1974) (absent a showing that it is necessary for an orderly presentation of a homicide case, allowing the deceased victim's parent to sit at the prosecutor's table during trial denied the defendant's right to a fair trial).

5.23 Victims' Rights at Preliminary Examinations

A. Notice Requirements

Crime victims in Michigan have a constitutional right to notification of court proceedings. Const 1963, art 1, § 24. The Crime Victim's Rights Act (CVRA), MCL 780.751 et seq., has several provisions about a victim's rights relating to the early stages of a case, including preliminary examinations.

If the victim requests, the prosecuting attorney or court must give notice to the victim of any scheduled court proceedings and any changes in the schedule of court proceedings. MCL 780.756(2) and MCL 780.786(3). This requirement

encompasses all court proceedings, including pretrial conferences, pre- and post-trial motion hearings, adjournments and continuances, and all schedule changes.

B. Separate Waiting Areas

MCL 780.757 provides:

> "The court shall provide a waiting area for the victim separate from the defendant, defendant's relatives, and defense witnesses if such an area is available and the use of the area is practical. If a separate waiting area is not available or practical, the court shall provide other safeguards to minimize the victim's contact with defendant, defendant's relatives, and defense witnesses during court proceedings."

If available and practical, an unused jury deliberation room, conference room, or isolated hallway could be used to minimize contact between the defendant or juvenile and the victim. The local victim-witness assistance program may have space available as well. In addition, the times that the defendant or juvenile and victim arrive at and leave the courthouse may be staggered to further limit contact between them.

C. Limitations on Testimony Identifying a Victim's Address, Place of Employment, or Other Information

MCR 6.201(A)(1) allows disclosure to the opposing party of the names and addresses of all lay witnesses that a party may call as witnesses at trial, including victims. As an alternative, "a party may provide the name of the witness and make the witness available to the other party for interview . . . ." *Id.*

In certain circumstances, the prosecuting attorney may request that a victim's identifying information be protected from disclosure in pretrial proceedings. MCL 780.758(1) provides:

> "Based upon the victim's reasonable apprehension of acts or threats of physical violence or intimidation by the defendant or at defendant's direction against the victim or the victim's immediate family, the prosecuting attorney may move that the victim or any other witness not be compelled to testify at pretrial proceedings or at trial for purposes of identifying the victim as to the victim's address, place of employment, or other personal identification without the victim's consent. A hearing on the motion shall be in camera."

5.24 Communicable Disease Testing and Examination

Under MCL 333.5129(3), a criminal defendant who is bound over to circuit court for a violation of any of the following offenses must be ordered by the district court to be examined or tested for venereal disease, hepatitis B infection, hepatitis C infection, and for the presence of HIV or an antibody to HIV if the court determines there is reason to believe the violation involved sexual penetration or exposure to the defendant's body fluid:

- Accosting, enticing, or soliciting a child under 16 years of age, MCL 750.145a.
- Gross indecency between males, MCL 750.338.
- Gross indecency between females, MCL 750.338a.
- Gross indecency between males and females, MCL 750.338b.
- Aiding and abetting an act prohibited by MCL 750.448 (soliciting prostitution) or aiding and abetting an act prohibited by MCL 750.449 (receiving a person into a place of prostitution), MCL 750.450.
- Keeping, maintaining, or operating a house of prostitution, MCL 750.452.
- Pandering, MCL 750.455.
- First-degree criminal sexual conduct, MCL 750.520b.
- Second-degree criminal sexual conduct, MCL 750.520c.
- Third-degree criminal sexual conduct, MCL 750.520d.
- Fourth-degree criminal sexual conduct, MCL 750.520e.
- Assault with intent to commit criminal sexual conduct, MCL 750.520g.

  Note: One of the foregoing offenses, aiding and abetting prostitution, MCL 750.450, is a 93-day/$500.00 misdemeanor, for which no preliminary examination is required. For the penalty provisions of this crime, which also include first-, second-, and third-offense provisions, see MCL 750.451. Additionally, the foregoing testing and examination provisions do not apply to "traditional waiver" cases because waived juveniles proceed directly to the criminal division of circuit court for arraignment on the information, not to district court. MCL 712A.4(10).

In addition to mandatory testing and examination under MCL 333.5129(3), the district court must order a defendant who has been bound over for any one of the foregoing offenses to undergo counseling.* MCL 333.5129(3). At a minimum, this counseling must include information regarding the treatment,

*See SCAO Form MC 234.

transmission, and protective measures of venereal disease, hepatitis B infection, hepatitis C infection, HIV infection, and AIDS. *Id*.

*For further information on confidentiality, see Smith, *Sexual Assault Benchbook* (MJI, 2002), Section 6.13(D).

A defendant's examination and test results conducted pursuant to MCL 333.5129 are generally confidential. However, exceptions exist. A person or agency conducting the examination must disclose the defendant's examination or test results (and other medical information, when specified) to the victim or person with whom defendant allegedly engaged in sexual intercourse or sexual contact or who was exposed to a body fluid during the crime, if the victim or person consents, MCL 333.5129(5); to the court, which must be made part of the record after the defendant is sentenced, MCL 333.5129(6); and to the department of corrections, and a person related to the juvenile, or the director of the public or private agency, institution, or facility, if the defendant or juvenile is placed under the custody of any of these entities. MCL 333.5129(7).*

"Venereal disease" means "syphilis, gonorrhea, chancroid, lymphogranuloma, venereum, granuloma inguinale, and other sexually transmitted diseases which the department by rule may designate and require to be reported." MCL 333.5101(1)(h).

5.25 Subpoenas to Compel Attendance at Preliminary Examinations

*MCR 6.110(C) incorporates the provisions of MCL 766.11. See the 1989 Staff Comment to MCR 6.110(C).

Each party at a preliminary examination may subpoena witnesses. MCR 6.110(C).* Additionally, MCL 766.11 enables magistrates and other court officers so authorized to issue subpoenas to compel the appearance of witnesses before the court during preliminary examinations. MCL 766.11(1). Courts of record, which include district courts, have authority to issue subpoenas that require witnesses to testify "in any matter or cause pending or triable in such courts." MCL 600.1455(1).

It is an abuse of discretion for a magistrate to fail to compel the attendance at a preliminary examination of a witness upon whose testimony the prosecution's showing of probable cause depends. In *People v Recorder's Court Judge*, 110 Mich App 739, 744-746 (1981), the Court of Appeals found that the magistrate failed to perform a clear legal duty to compel the attendance of a witness whom the magistrate said could have furnished testimony to establish probable cause on the elements of the alleged crime. The magistrate, having stated that the witness should have been produced by the prosecution, refused to issue a bench warrant for the witness and dismissed the charges because probable cause on the elements of the crime had not been shown.

A judge may certify that a "material witness" located outside of Michigan be taken into custody and brought to testify in a prosecution within this state. MCL 767.93(1) states:

> "If a person in a state, which by law provides for commanding persons within its borders to attend and testify in criminal prosecutions, or grand jury investigations commenced or about to commence, in this state, is a material witness in a prosecution pending in a court of record in this state, or in a grand jury investigation which has commenced or is about to commence, a judge of the court may issue a certificate under the seal of the court stating these facts and specifying the number of days the witness will be required. The certificate may include a recommendation that the witness be taken into immediate custody and delivered to an officer of this state to assure his[or her] attendance in this state. This certificate shall be presented to a judge of a court of record in the county in which the witness is found."

A defendant requesting the presence of an out-of-state witness under MCL 767.93 must (1) designate the proposed witness's location with a reasonable degree of certainty; (2) file a timely petition; and (3) make out a *prima facie* case that the witness's testimony is material. *People v McFall*, 224 Mich App 403, 409 (1997), citing *People v Williams*, 114 Mich App 186, 201 (1982). The party seeking the presence of an out-of-state witness under MCL 767.93(1) should present evidence in the form of an affidavit of the witness or other competent evidence. *McFall*, *supra* at 410. In *McFall*, the Court of Appeals found no abuse of discretion in the circuit court's failure to certify defendant's out-of-state brother as a material witness for defendant's trial because defendant failed to establish a *prima facie* case that his brother's testimony was material. Additionally, defendant's counsel did not interview the brother and defense counsel acknowledged that the brother was not a *res gestae* witness and had not seen the events relating to the alleged crime. *Id*. at 407, 410. See also *People v Loyer*, 169 Mich App 105, 113-116 (1988), where the Court of Appeals determined that materiality was lacking because the out-of-state witnesses had no knowledge of the circumstances of the alleged crime. In *Williams*, *supra*, the Court of Appeals found defendant's petition to compel the attendance of two out-of-state witnesses deficient because it was filed only four days before trial after a delay of five months, it failed to state the location of the witnesses, and it failed to establish a *prima facie* case of materiality. *Williams*, *supra* at 199-202.

5.26 Application of the Rules of Evidence in Preliminary Examinations

A preliminary examination must be conducted in accordance with the rules of evidence, except as otherwise provided by law. MCR 6.110(C) and MRE 1101(a). Hearsay is allowed to prove certain elements of property crimes. MRE 1101(b)(8) provides that "[a]t preliminary examinations in criminal cases, hearsay is admissible to prove, with regard to property, the ownership, authority to use, value, possession and entry."

Bindover must be based on legally admissible evidence. *People v Kubasiak*, 98 Mich App 529, 536 (1980). An evidentiary error during a preliminary examination does not require automatic reversal of a subsequent conviction unless the error, after review of the circumstances in their entirety, results in a miscarriage of justice. *People v Hall*, 435 Mich 599, 601, 611 (1990). See also MCL 769.26 ("No verdict shall be set aside or reversed or a new trial be granted . . . on the ground . . . of improper admission of evidence . . . unless in the opinion of the court, after an examination of the entire cause, it shall affirmatively appear that the error complained of has resulted in a miscarriage of justice.")

In *Hall, supra*, the Court extended the "harmless error rule" to the improper admission of hearsay evidence at a preliminary examination. The Court declined to reverse defendant's conviction, finding that he received a fair trial and was not prejudiced by the error.

5.27 Admissibility of Reports by State Police Forensic Technicians

A report by a technician of the forensic science division of the State Police, signed by the technician or notarized, can be accepted into evidence in lieu of the technician's appearance and testimony at a preliminary examination. MCL 600.2167(1). See also MCR 6.110(C) ("Except as otherwise provided by law, the court must conduct the examination in accordance with the rules of evidence.")

> **Note:** A forensic report that is unsigned or not notarized in violation of MCL 600.2167(1) may still be admissible under the rules of evidence governing contents of writings, originals, and duplicates, MRE 1001-1003. To determine whether a statute or court rule or rule of evidence takes precedence, see *McDougall v Schanz*, 461 Mich 15, 30-31 (1999) (to the extent that a statute establishes a procedural rule involving the mere dispatch of judicial business, and not a substantive rule, it will be superceded by court rule or rule of evidence).

Two copies of the forensic report must be furnished to the prosecuting attorney before the examination. The prosecuting attorney must immediately furnish one copy to the defense attorney, or to the defendant if an appearance or appointment of defense counsel has not been filed. MCL 600.2167(2).

Upon receiving copies of the report, the prosecuting attorney must notify the court before which the preliminary examination will be held that copies of the report are in the prosecuting attorney's possession. If such notification is made less than five days before the date for the examination, the court must adjourn the examination. MCL 600.2167(3).

Defendant or defendant's attorney may request by written notice served on the prosecuting attorney that the technician testify on behalf of the prosecution at the preliminary examination. Notice must be served not more than five days after defendant receives a copy of the report. The technician may be sworn and testify by voice or video communication* that enables the witness, court, all parties, and counsel to hear and speak to each other in court, chambers, or other suitable place. A record of the testimony will be taken as for other preliminary examination testimony. If no suitable equipment is available, the technician must testify in person. MCL 600.2167(4).

*See Section 5.29, below, for information on video or telephonic testimony.

The prosecuting attorney may move in writing not less than five days before the date set for the preliminary examination to permit a forensic pathologist or medical examiner to be sworn and testify in the same fashion as in MCL 600.2167(4). The court must grant the motion for good cause shown. A record of the testimony must be taken in the same manner as for other testimony at the preliminary examination. MCL 600.2167(5).

A prosecutor's failure to furnish a copy of a technician's report "immediately" under the terms of MCL 600.2167(2) is not reversible error where delay does not prejudice the defendant. In *People v Anderson,* 88 Mich App 513, 517-518 (1979), the Court of Appeals determined that despite the prosecutor's five-day delay in furnishing the report, defendant received the report three weeks in advance of the preliminary examination. This provided ample time for defendant to review the report and decide whether to request the technician to testify in person.

5.28 Evidentiary Hearings During Preliminary Examinations

Under MCR 6.110(D), the court need not conduct a separate evidentiary hearing during a preliminary examination if there is "a preliminary showing that the evidence in question is admissible . . . ." If an evidentiary hearing is conducted during the preliminary examination, a party may obtain a review of the district court's determination in the circuit court; if no evidentiary hearing was conducted during the preliminary examination, a party may request an evidentiary hearing in the circuit court. MCR 6.110(D) provides:

> **"(D) Exclusionary Rules.** If, during the preliminary examination, the court determines that evidence being offered is excludable, it must, on motion or objection, exclude the evidence. If, however, there has been a preliminary showing that the evidence is admissible, the court need not hold a separate evidentiary hearing on the question of whether the evidence should be excluded. The decision to admit or exclude evidence, with or without an evidentiary hearing, does not preclude a party from moving for and obtaining a determination of the question in the trial court on the basis of

> "(1) a prior evidentiary hearing, or
>
> "(2) a prior evidentiary hearing supplemented with a hearing before the trial court, or
>
> "(3) if there was no prior evidentiary hearing, a new evidentiary hearing."

If the attorneys for the parties agree, a motion to exclude evidence made or filed in the circuit court may be premised on the preliminary examination transcript. See MCR 6.110(D) and *People v Zahn*, 234 Mich App 438, 442 (1999), and *People v Kaufman*, 457 Mich 266, 275-276 (1998), overruling in part *People v Talley*, 410 Mich 378 (1981).

5.29 Examination of Witnesses

*See Section 5.27 for discussion on the use of forensic laboratory reports in lieu of live testimony.

At a preliminary examination, a magistrate is required to examine the complainant and the witnesses in support of the prosecution on oath in the presence of the defendant, except as described in MCL 600.2167.* The examination is to be made "in regard to the offense charged and in regard to any other matters connected with the charge that the magistrate considers pertinent." MCL 766.4. Although MCL 766.4 also provides that the judge shall examine the "complainant and the witnesses in support of the prosecution," it is not imperative that the complainant be produced if sufficient other evidence is produced. *People v Meadows*, 175 Mich App 355, 357-359 (1989).

Each party may examine witnesses at the preliminary examination. MCR 6.110(C). Additionally, MCL 766.12 requires the examination and cross-examination of the defendant's witnesses following the presentation of testimony in support of the prosecution. It also provides for cross-examination of the prosecution's witnesses.

Defendant's latitude in presenting witnesses is limited by the establishment of probable cause. In other words, once probable cause is established by legally admissible evidence, the defendant is no longer entitled to present further evidence or witnesses. In *People v Springer*, 64 Mich App 260, 262 (1975), the Court of Appeals upheld the trial court's denial of defendant's motion to quash the information against him. The Court found that defendant, who had argued that the magistrate had improperly restricted cross-examination, had in fact cross-examined one witness at length. The testimony of that witness, a police officer who had seen the alleged crime, satisfied the probable cause requirement. In concluding that the magistrate properly restricted defendant's cross-examination, the Court of Appeals made the following comments:

> "T[he] right to a preliminary examination does not mean an entire trial; there is no right to parade witness after witness before the magistrate merely creating one fact issue after

> another. . . . After the crime and its elements are established and the identity of the person probably committing it is established, the rest of the testimony becomes a question of fact and credibility for the trier of the facts to determine; namely the jury or trial judge. The examining magistrate does not have to find guilt beyond a reasonable doubt. He has discretionary control over the entire preliminary examination." *Id*.

The defendant is entitled to call and cross-examine adverse witnesses as if they had been called by the prosecution. In *People v Johnson*, 8 Mich App 462, 466 (1967), defense counsel sought to examine a police officer as the agent of an adverse party. The officer had interrogated defendant and three other witnesses. At the preliminary examination, the prosecutor had indicated he did not want to call the officer and successfully argued that defendant could not subject his own witness to cross-examination. On appeal, defendant argued that the denial of effective cross-examination amounted to a denial of due process. The Court of Appeals observed that the "difficulty encountered in deciding whether to apply the adverse agent rule of evidence involves the very nature of the preliminary examination itself. The right of the accused to produce witnesses and to cross-examine witnesses is guaranteed by MCL 766.12 and in this respect the preliminary examination is an adversary proceeding." *Johnson, supra* at 466. It also noted that under a precursor to MCL 768.22, the rules of evidence in civil cases applied in criminal proceedings except as otherwise provided by law. The Court found no compelling reason not to apply the adverse agent rule of evidence to a preliminary examination and cited *People v Saccoia*, 268 Mich 132, 142 (1934), as recognizing the rule in a criminal proceeding.

Video or telephonic testimony. Effective January 1, 2006, MCR 6.006 provides for video or telephonic conferencing under certain circumstances. MCR 6.006(A), (B), and (D). MCR 6.006 states, in part:

> **"(A) Defendant at a Separate Location.** District and circuit courts may use two-way interactive video technology to conduct the following proceedings between a courtroom and a prison, jail, or other location: . . . waivers and adjournments of preliminary examinations.
>
> **"(B) Defendant in the Courtroom – Preliminary Examinations.** As long as the defendant is either present in the courtroom or has waived the right to be present, on motion of either party, district courts may use telephonic, voice, or video conferencing, including two-way interactive video technology, to take testimony from an expert witness or, upon a showing of good cause, any person at another location in a preliminary examination.

* * *

> **"(D) Mechanics of Use.** The use of telephonic, voice, video conferencing, or two-way interactive video technology, must be in accordance with any requirements and guidelines established by the State Court Administrative Office, and all proceedings at which such technology is used must be recorded verbatim by the court."

MCL 760.11a also allows for telephonic or video testimony at a preliminary examination. MCL 760.11a provides:

> "On motion of either party, the magistrate may permit the testimony of an expert witness or, upon a showing of good cause, any witness to be conducted by means of telephonic, voice, or video conferencing."

5.30 Corpus Delicti Rule

The *corpus delicti* rule generally states that the injury, loss, or wrong resulting from the commission of an offense must be established by evidence other than the defendant's confession. *People v Wells*, 87 Mich App 402, 406 (1978). The purpose of the rule is to prevent the conviction of a defendant for a crime never committed. *People v Cotton*, 191 Mich App 377, 384-385 (1991). The rule applies to all crimes, *Id*. at 389, and to preliminary examinations. *People v Randall*, 42 Mich App 187, 190 (1972).

Under the *corpus delicti* rule, proof of each element of the criminal offense is not required. Instead, the rule is satisfied "when the prosecutor presents direct or circumstantial evidence, independent of the confession, establishing (1) the occurrence of the specific injury and (2) some criminal agency as the source of the injury. Once this showing is made, a defendant's confession may be used to establish identity, intent, or aggravating circumstances." *Cotton*, *supra* at 394. See also *People v Williams*, 422 Mich 381, 392 (1985), which defines the rule for first-degree murder cases (the "corpus delicti of first-degree premeditated murder consists of two elements: the death of the victim and some criminal agency as the cause").

The *corpus delicti* rule applies only to a confession, not an admission. *People v Rockwell*, 188 Mich App 405, 407 (1991). Accordingly, a statement made by a criminal defendant before the commission of the alleged crime is not a confession and can be used to satisfy the *corpus delicti* rule. *People v Allen*, 91 Mich App 63, 66 (1979).

The *corpus delicti* rule is not satisfied where evidence independent of defendant's confession fails to establish a victim's disappearance as an injury resulting from a criminal agency. In *People v McMahan*, 451 Mich 543, 551-552 (1994), no motive was presented independent of defendant's confession, no murder weapon was recovered, and no autopsy could be performed because the victim's body was never found. The Supreme Court held that

"[a]bsent some showing of criminal agency, there are any number of possible explanations for an individual's disappearance, including death by accidental means. . . . In particular, this Court has underscored the importance of the criminal-agency requirement in cases where, as here, the victim's body is not found." *Id*. at 550. Additionally, the Supreme Court in *McMahan* declined to replace the *corpus delicti* rule with the trustworthiness rule adopted by the federal judiciary, which requires the prosecution to "introduce substantial independent evidence which would tend to establish the trustworthiness of the statement."

5.31 Magistrate's Authority to Decide Entrapment Issue

The entrapment defense may only be advanced at the trial level; thus, an examining magistrate does not have jurisdiction at the preliminary examination to resolve a claim of entrapment. See *People v Moore*, 180 Mich App 301, 308-309 (1989) (the entrapment issue must be resolved at a separate evidentiary hearing conducted by the court that has jurisdiction to conduct the trial).*

*The *Moore* case is further discussed in Section 5.3, above.

5.32 Records of Preliminary Examinations

MCR 6.110(C) states that "[a] verbatim record must be made of the preliminary examination."

Additionally, MCL 600.8611 provides:

> "All proceedings in the district court which are to be recorded under [MCL 600.8331] shall be recorded by the district court recorder by the use of recording devices approved by the state court administrator, or taken by the district court reporter."

MCL 600.8331 requires all proceedings in district court to be recorded as provided in MCL 600.8611.

5.33 Transcripts of Testimony

Effective January 1, 2006, MCR 6.113(D) states:

> **"(D) Preliminary Examination Transcript.** The court reporter shall transcribe and file the record of the preliminary examination if such is demanded or ordered pursuant to MCL 766.15."

MCL 766.15(2)-(3) state:

> "(2) A written transcript of the testimony of a preliminary examination need not be prepared or filed except upon written demand of the prosecuting attorney, defense attorney, or defendant if the defendant is not represented by an attorney, or as ordered sua sponte by the trial court. A written demand to prepare and file a written transcript is timely made if filed within 2 weeks following the arraignment on the information or indictment. A copy of a demand to prepare and file a written transcript shall be filed with the trial court, all attorneys of record, and the court which held the preliminary examination. Upon sua sponte order of the trial court or timely written demand of an attorney, a written transcript of the preliminary examination or a portion thereof shall be prepared and filed with the trial court.
>
> "(3) If a written demand is not timely made as provided in subsection (2), a written transcript need not be prepared or filed except upon motion of an attorney or a defendant who is not represented by an attorney, upon cause shown, and when granting of the motion would not delay the start of the trial. When the start of the trial would otherwise be delayed, upon good cause shown to the trial court, in lieu of preparation of the transcript or a portion thereof, the trial court may direct that the defense and prosecution shall have an opportunity before trial to listen to any electronically recorded testimony, a copy of the recording tape or disc, or a stenographer's notes being read back."

The court may hold the arraignment on the information before the preliminary examination transcript has been prepared and filed. MCR 6.113(A).

5.34 Bindover Following Preliminary Examination

A. Bindover After Waiver

MCR 6.110(A) requires the district court to bind a defendant over for trial when it permits the defendant to waive a preliminary examination. See Section 5.16, above, for more information on waiving preliminary examinations.

B. Bindover After Finding of Probable Cause

MCR 6.110(E) requires the court to bind a defendant over for trial upon finding probable cause to believe that an offense not cognizable by the district court has been committed and probable cause to believe defendant committed it. See Section 5.5(A), above, for more information on probable-cause determinations.

C. Bindover on a Greater or Different Offense

An examining magistrate may bind a defendant over on a charge greater than that contained in the information without a motion by the prosecutor, provided the prosecutor does not object. In *People v Gonzalez*, 214 Mich App 513, 516 (1995), the Court of Appeals, relying on *Yaner v People*, 34 Mich 286, 288 (1876), held that a magistrate had a duty to examine all matters related to the charge and to bind the defendant over on the greater charge, or a higher degree of the same charge, where the evidence warrants. The Court stated that the prosecutor's failure to object to the greater charge constituted a tacit adoption of the magistrate's decision.

A magistrate may grant a prosecutor's motion to amend a complaint to include a greater offense where the evidence at the preliminary examination supports probable cause as to the elements of the greater offense and the amendment does not cause unacceptable prejudice to the defendant. *People v Hunt*, 442 Mich 359, 364-365 (1993), and *People v Joseph*, 114 Mich App 70, 78 (1982). In *Hunt*, the Supreme Court found that testimony at the preliminary examination supported a charge of third-degree criminal sexual conduct as well as the original but lesser charge of gross indecency. The Supreme Court stated that the amendment did not cause defendant prejudice due to unfair surprise, inadequate notice, or insufficient opportunity to defend. In *Joseph*, the Court of Appeals, finding no unfair surprise or prejudice to the defendant, affirmed the amendment of a complaint from charges of felonious assault and breaking and entering an occupied dwelling with the intent to commit a felonious assault, to assault with intent to murder and breaking and entering an occupied dwelling with intent to commit an assault with intent to murder.

In cases involving property crimes, a magistrate cannot sua sponte bind a defendant over on a different charge if there is a legitimate question concerning the value of the property involved in the different charge. In *People v Brow*, 67 Mich App 407, 411 (1976), the prosecutor, before the commencement of the preliminary examination, amended the charge against the defendant to larceny from a motor vehicle of property in excess of $5.00. The complainant's testimony adduced at the examination estimated the personal value (not market value) of the alleged stolen property—some tools and a tool box—to be approximately $230.00. The defendant conceded that the value of the property was in excess of $5.00 and did not cross-examine the complainant concerning this element. At the conclusion of the preliminary examination, the prosecutor moved for a bindover on the amended charge. However, the magistrate, sua sponte, bound defendant over on a charge of larceny over $100.00. The Court of Appeals reversed and remanded, finding that the magistrate deprived the defendant of his right to a preliminary examination by altering the charged offense at bindover. The Court explained as follows:

> "In the instant case, there was a legitimate question concerning whether the stolen property exceeded $100 in value. The . . . [complainant] made a personal estimate of the stolen goods'

> worth, one not based on market value but on personal value. . . . Because the complaint charged a theft of property worth more than $5, defendant conceded the value element and did not cross-examine the complainant concerning this element. The magistrate's alteration of the charged offense, thus, deprived defendant of important cross-examination and, consequently, of his right to a preliminary examination." *Id*. at 411-412. [Citation omitted.]

D. Bindover on a Lesser Offense

A magistrate may bind over a defendant on a lesser charge than the original based on the presentation of mitigating evidence. In *People v King*, 412 Mich 145, 154 (1981), the Supreme Court noted that a magistrate's inquiry is not limited to whether the prosecution presents evidence on each element of the offense charged but must also include an examination of the "whole matter." If probable cause is lacking, the magistrate "should not bind the defendant over on the offense charged but may bind him over on a lesser offense as to which he is so satisfied." *Id*. In *King*, the magistrate refused to bind defendant over on first- or second-degree murder and instead bound him over on a charge of manslaughter. See also *People v Stafford*, 434 Mich 125, 134-135 (1990), where the Supreme Court affirmed the Court of Appeals' finding that the magistrate on remand abused his discretion when he bound defendant over on a charge of second-degree murder instead of involuntary manslaughter where mitigating evidence of self-defense was presented.

In *People v Neal*, 201 Mich App 650, 656 (1993), the Court of Appeals, relying on *King*, *supra*, found no abuse of discretion by the district court in binding defendant over on a charge of voluntary manslaughter instead of second-degree murder when it concluded, after examining the totality of the evidence, that defendant had no intent to kill the victim since he acted out of mortal fear for his safety.

A magistrate may not discharge the defendant where the evidence supports a lesser offense but not the greater offense charged. In *People v Harris*, 159 Mich App 401, 405-406 (1987), the Court of Appeals, relying on *King*, *supra*, and MCL 766.13, held that the magistrate abused his discretion by failing to consider lesser offenses and by failing to bind a defendant over on involuntary manslaughter charges supported by evidence that did not support the original open-murder charge.

E. Bindover When Defendant Is Charged With Open Murder

Probable cause for premeditation and deliberation need not be shown at a preliminary examination in order to bind over a defendant for trial on open murder charges. *People v Coddington*, 188 Mich App 584, 592-594 (1991). See Section 5.5(A), above, for more information on probable cause determinations.

5.35 Setting Case for Trial When There Is Probable Cause to Believe That Defendant Committed a Misdemeanor

If the court finds probable cause to believe that the defendant committed an offense cognizable by the district court, it must not bind defendant over; instead, it must proceed as if the defendant had initially been charged with that misdemeanor offense. MCR 6.110(E). See also MCL 766.14(1) ("If the court determines . . . that the offense charged is not a felony or that an included offense that is not a felony has been committed, the accused shall not be dismissed but the magistrate shall proceed in the same manner as if the accused had initially been charged with an offense that is not a felony.")

5.36 Transfer to Juvenile Court When There Is No Probable Cause to Believe That Juvenile Committed a "Specified Juvenile Violation"

Both MCL 766.14(2) and MCR 6.911(B) provide that if the magistrate at a preliminary examination finds that a "specified juvenile violation" did not occur or that there is not probable cause to believe that the juvenile committed a "specified juvenile violation," but that there is instead probable cause to believe that the juvenile committed some other offense, the magistrate must transfer the case to the family division of the circuit court. If the case is transferred, a transcript of the preliminary examination must be sent to the family division without charge upon request. MCL 766.14(3) adds that transfer of the case does not prevent the family division from waiving jurisdiction using the "traditional waiver" procedures under MCL 712A.4.*

*See Miller, *Juvenile Justice Benchbook (Revised Edition)* (MJI, 2003), Chapter 16 for information on "traditional waiver."

The definition of "specified juvenile violation"* includes lesser-included offenses and other offenses arising out of the same transaction as a "specified juvenile violation" if the juvenile is *charged* with a "specified juvenile violation." This suggests that the district court may bind the juvenile over for trial if it finds probable cause that the juvenile committed a lesser-included or other offense rather than the charged enumerated offense. However, the district court may not bind the juvenile over for trial on these other offenses unless it also finds probable cause that the juvenile committed an enumerated "specified juvenile violation." See *People v Veling*, 443 Mich 23, 31, 42-43 (1993), where the Michigan Supreme Court held that the circuit court gains jurisdiction over non-enumerated offenses only if the juvenile is also *charged in circuit court* with an enumerated offense, and the circuit court does not lose jurisdiction to sentence the juvenile if the juvenile is convicted of a lesser-included offense or other offense that is not an enumerated offense.

*See Section 5.7(A) for a list of the "specified juvenile violations."

On the other hand, the district court may bind the juvenile over to circuit court if it finds probable cause to believe that the juvenile committed a "specified juvenile violation" other than the offense charged in the district court complaint. For example, if the juvenile is charged with first-degree murder, and the district court finds probable cause that the juvenile committed second-

degree murder, the juvenile could be bound over for trial because second-degree murder is also an enumerated "specified juvenile violation."

5.37 Discharge of Defendant and Prosecutor's Right to Bring New Charges

*An exception exists for cases involving judicial disqualification as provided in MCR 8.111(C). See MCR 6.110(F).

MCR 6.110(F) provides that "[i]f, after considering the evidence, the court determines that probable cause does not exist to believe either that an offense has been committed or that defendant committed it, the magistrate must discharge the defendant without prejudice. . . ." A subsequent preliminary examination must be held before the same judicial officer,* and the prosecutor must present additional evidence to support the charge. See MCR 6.110(F) and MCL 766.13, which are designed to prevent forum shopping.

A dismissal of charges at the end of the first preliminary examination does not preclude the prosecutor from initiating another prosecution for the same offense as long as the examination is held before the same magistrate and additional evidence is provided to support the charge. See *People v Hayden*, 205 Mich App 412, 414 (1994) (a "dismissal of a prosecution at preliminary examination raises no res judicata or collateral estoppel bar to a subsequent prosecution"), citing *People v George*, 114 Mich App 204, 210 (1982). In *People v Robbins*, 223 Mich App 355, 363 (1997), the Court of Appeals held that MCR 6.110(F) allows a second preliminary examination if "additional" evidence—not necessarily "newly discovered" evidence—is presented at the second examination. In so holding, the Court of Appeals determined that the Supreme Court, in drafting MCR 6.110(F), made a deliberate choice of wording as to which type of evidence would properly support the initiation of a second examination. In accordance with the plain meaning of the court rule, and in consultation with *Black's Law Dictionary (5th ed)*, p 35, 940, the Court of Appeals defined "additional" as joining one thing to another to form one aggregate, and "newly discovered evidence" as evidence new in relation to a fact in issue discovered after judgment. *Robbins*, *supra* at 360-361. Finally, the Court stated that its decision was not meant to encourage prosecutors to subject defendants to multiple examinations.

A defendant's due process rights may be implicated, if not violated, by repeated preliminary examinations that are intended to harass the defendant or forum shop. See *People v Dunbar*, 463 Mich 606, 614 (2001), citing *Robbins*, *supra* at 363 ("subjecting a defendant to repeated preliminary examinations violates due process if the prosecutor attempts to harass the defendant or engage in 'judge-shopping'"). Some factors to consider in evaluating whether a due process violation has occurred are: (1) the reinstitution of charges without additional, noncumulative evidence not introduced at the first preliminary examination; (2) the reinstitution of charges to harass; and (3) judge-shopping to obtain a favorable ruling. *Dunbar*, *supra* at 613, citing *People v Vargo*, 139 Mich App 573, 578 (1984).

A defendant's due process rights are not violated where, to avoid disclosure of an informant's identity, the prosecutor obtains dismissal of charges before a bindover decision is reached by the visiting judge at the first preliminary examination and at the second examination before a different judge, obtains a favorable ruling on the disclosure issue and a bindover for trial. *Dunbar*, *supra* at 615-618. The Supreme Court in *Dunbar* determined that the record showed no evidence of judge-shopping. The prosecutor had asked the judge at the first examination for time to provide case law supporting his position on the confidentiality of informants before seeking dismissal. Moreover, the judge demonstrated no suspicion of judge-shopping, and there was no evidence the prosecutor knew the identity of the second judge. The visiting judge had visited with some regularity, and "it was by no means certain that a dismissal would result in the case being heard by a different judge." *Id*. at 616.

In *People v Denio*, 454 Mich 691, 712 n 22 (1997), the Supreme Court in a footnote urged magistrates to carefully review conspiracy charges brought by prosecutors at the preliminary examination stage of court proceedings to ensure that sufficient evidence exists for each element of that separate crime. In *Denio*, the defendants raised the concern that prosecutors will include conspiracy charges, regardless of the evidence, whenever a group of people engage in drug activity. In the footnote, the Supreme Court stated that it was aware of the potential for abuse, but it noted that MCL 767.42 and MCR 6.110(F) provide safeguards by requiring a preliminary examination as a condition precedent to the filing of an information. In also noting that a defendant can seek review of a magistrate's probable cause determination, the Supreme Court provided a cautionary note to magistrates:

> "With these safeguards noted, we bring this potential for abuse to the attention of the magistrates and remind them of the important role they play in safeguarding the rights of both the defendant and the people of the State of Michigan. The reviewing magistrate should carefully examine the conspiracy charge to ensure that sufficient evidence exists for each of the elements of that separate crime." *Denio*, *supra* at 712 n 22.

5.38 Setting Bail at the Conclusion of Preliminary Examination

MCL 766.5 provides that a magistrate is required to accept bail and discharge a defendant until trial if probable cause is shown in relation to an offense bailable by the magistrate and sufficient bail is offered. However, if bail is insufficient or the offense is not bailable by the magistrate, the defendant must be committed to jail before trial. This statute does not preclude the magistrate from releasing the accused on his or her own recognizance where authorized by law.

Before arraignment on the information, any court with proceedings pending against defendant may modify a prior release decision on a motion by a party

or on its own initiative if it finds there is substantial reason to do so. MCR 6.106(H)(2)(a). After arraignment on the information, the court with jurisdiction of the defendant may on a party's motion or on its own initiative make a de novo determination and modify a previous release decision. MCR 6.106(H)(2)(b). The party seeking modification of a previous release decision has the burden of going forward. MCR 6.106(H)(2)(c).

In *People v Wershe*, 166 Mich App 602, 606-608 (1988), the Court of Appeals concluded that under a previous court rule governing pretrial release, a bail decision that follows a preliminary examination should be considered a new decision and subject to deference. The Court reasoned that information is more fully developed after the preliminary examination since background reports on bail can be prepared. The Court ruled that Detroit Recorder's Court erred in vacating bail set after preliminary examination in favor of bail set after arraignment. The ruling was made without prejudice to the defendant's right to seek review of the post-examination bail order.

In determining whether to release the defendant and what conditions the court should place on a defendant, the court should consider the factors found in MCR 6.106(F)(1), which states:

> "(1) In deciding which release to use and what terms and conditions to impose, the court is to consider relevant information, including
>
> > "(a) defendant's prior criminal record, including juvenile offenses;
> >
> > "(b) defendant's record of appearance or nonappearance at court proceedings or flight to avoid prosecution;
> >
> > "(c) defendant's history of substance abuse or addiction;
> >
> > "(d) defendant's mental condition, including character and reputation for dangerousness;
> >
> > "(e) the seriousness of the offense charged, the presence or absence of threats, and the probability of conviction and likely sentence;
> >
> > "(f) defendant's employment status and history and financial history insofar as these factors relate to the ability to post money bail;
> >
> > "(g) the availability of responsible members of the community who would vouch for or monitor the defendant;
> >
> > "(h) facts indicating the defendant's ties to the community, including family ties and relationships, and length of residence, and

> "(i) any other facts bearing on the risk of nonappearance or danger to the public."

If the court orders the defendant released on conditions that include money bail, the court must state the reasons for its decision on the record. MCR 6.106(F)(2). The court need not make a finding on each of the factors enumerated in the court rule. *Id*. However, the court must make findings on the record in accordance with MCL 765.6(1), which provides:

> "(1) Except as otherwise provided by law, a person accused of a criminal offense is entitled to bail. The amount of bail shall not be excessive. The court in fixing the amount of the bail shall consider and make findings on the record as to each of the following:
>
> "(a) The seriousness of the offense charged.
>
> "(b) The protection of the public.
>
> "(c) The previous criminal record and the dangerousness of the person accused.
>
> "(d) The probability or improbability of the person accused appearing at the trial of the cause."

Under MCL 765.6b, a judge or district court magistrate may release a defendant subject to conditions for the purpose of protecting other individuals. In order to do so, the judge or magistrate is required to make a finding of need for the conditions and inform the defendant on the record, either orally or by a writing personally delivered to the defendant, of the specific conditions imposed. The judge or magistrate also is required to inform the defendant that upon violation of the conditions, the defendant will be subject to arrest without warrant and may have his or her bond "forfeited or revoked and new conditions of release imposed." MCL 765.6b(1). An order issued under MCL 765.6b(1) must contain certain information as described in MCL 765.6b(2) and may include as a condition that defendant not purchase or possess a firearm as stated in MCL 765.6b(3). The judge or magistrate shall immediately direct a law enforcement agency to enter the order into the Law Enforcement Information Network (LEIN) and shall immediately direct the agency to remove the order upon its rescission. MCL 765.6b(4).

Under MCL 765.6b, a court may not forfeit a surety bond where the surety received no notice of, and did not consent to, a provision added to the bond by the court to protect an individual from the release of the defendant. In *Kondzer v Wayne County Sheriff*, 219 Mich App 632, 634-640 (1996), the plaintiffs, John and Mary Kondzer, sued as sureties in circuit court, alleging breach of contract against the defendant for failing to return the $50,000.00 surety bond that was posted for the criminal defendant, David Wilke. In the underlying criminal case, the district court amended defendant's surety bond at the preliminary examination, imposing an additional condition that defendant

have no contact with the complaining witness. The surety was not present when this condition was imposed. The defendant subsequently violated this condition, and the prosecutor sought forfeiture of the bond. The district court ruled that it lacked jurisdiction to decide the matter since defendant had been bound over to circuit court. In the civil suit, the circuit court granted summary disposition to defendants, concluding that MCL 765.6b provided authority for the forfeiture of the surety bond. The Court of Appeals reversed the circuit court, holding that while MCL 765.6b provided authority for bail forfeiture when a condition is violated, it did not abolish the common law principle that "in order for a surety to be bound by a new condition imposed after the signing of the bond, the surety must consent." *Kondzer, supra* at 638. To incorporate the common-law, the Court interpreted MCL 765.6b to mean that:

> "where the condition [of bail] was imposed with notice to and the consent of the surety, forfeiture would be appropriate, but in a case like the one at bar, where the surety was not given notice of and did not consent to the imposition of the protective condition, forfeiture is not proper and is an abuse of the court's discretion." *Kondzer, supra* at 639.

Bail for juveniles in "automatic waiver" cases is addressed at arraignment in district court. Unless detention without bail is allowed, the magistrate or court must advise the juvenile of a right to bail as provided for an adult accused. "The magistrate or court may order a juvenile released to a parent or guardian on the basis of any lawful condition, including that bail be posted." MCR 6.909(A)(1).

MCR 6.909(A)(2)(a)-(b) provide:

> "If the proof is evident or if the presumption is great that the juvenile committed the offense, the magistrate or the court may deny bail:
>
> "(a) to a juvenile charged with first-degree murder, second-degree murder, or
>
> "(b) to a juvenile charged with first-degree criminal sexual conduct or armed robbery,
>
> "(*i*) who is likely to flee, or
>
> "(*ii*) who clearly presents a danger to others."

The rules governing review and modification of release decisions in criminal cases involving adults also apply to juveniles in "automatic waiver" cases.

5.39 Circuit Court Arraignment and Plea in District Court Following Conclusion of Preliminary Examination

Effective January 1, 2006, MCR 6.111 allows a district court judge to conduct a circuit court arraignment and accept a defendant's plea following the preliminary exam. MCR 6.111 states:

> "(A) If the defendant, the defense attorney, and the prosecutor consent on the record, the circuit court arraignment may be conducted and a plea of not guilty, guilty, nolo contendere, guilty but mentally ill, or not guilty by reason of insanity may be taken by a district judge in criminal cases cognizable in the circuit court immediately after the bindover of the defendant. Following a plea, the case shall be transferred to the circuit court where the circuit judge shall preside over further proceedings, including sentencing.
>
> "(B) Arraignments conducted pursuant to this rule shall be conducted in conformity with MCR 6.113.*
>
> "(C) Pleas taken pursuant to this rule shall be taken in conformity with MCR 6.301, 6.302, 6.303, and 6.304, as applicable, and, once taken, shall be governed by MCR 6.310.
>
> "(D) Each court intending to utilize this rule shall submit a local administrative order to the State Court Administrator pursuant to MCR 8.112(B) to implement the rule."

*See Hummel, Criminal Procedure Monograph 4—*Felony Arraignments in District Court—Third Edition* (MJI, 2006) for information on arraignments conducted pursuant to MCR 6.113.

Note: Since 1992, the Michigan Supreme Court has authorized the assignment of district court judges to the circuit court for the purpose of taking not guilty and guilty pleas in cases cognizable in the circuit court. Assignments in participating jurisdictions were authorized through a local administrative order signed by the chief judges of the circuit and district courts and approved by the State Court Administrator. See Administrative Order No. 1992-5, 440 Mich xiii (1992), rescinded by Administrative Order No. 2003-4, 473 Mich xx (2005), effective January 1, 2006. This procedure is now governed by MCR 6.111.

5.40 Bindover Certificate and Return

"Immediately on concluding a [preliminary] examination, the court must certify and transmit to the court before which the defendant is bound to appear the prosecutor's authorization for a warrant application, the complaint, a copy of the register of actions, the examination return, and any recognizances received." MCR 6.110(G). According to its 1989 Staff Comment, MCR 6.110(G) is designed to be consistent with MCL 766.15(1).

MCL 766.15(1) states that where a magistrate refuses or neglects to return all examinations and recognizances, the magistrate immediately may be compelled to do so by order of the court. In case of disobedience, the magistrate may be proceeded against as for a contempt by an order to show cause or a bench warrant.

Upon the filing of the return in circuit court, a district court loses jurisdiction of a criminal case in which it has held a preliminary examination. *People v Gaines*, 53 Mich App 443, 449 (1971). See also MCL 600.8311(d), which limits district court jurisdiction to preliminary examinations in felony and misdemeanor cases not cognizable by that court.

5.41 Scheduling the Arraignment on the Information

"Unless the trial court does the scheduling of the arraignment on the information, the district court must do so in accordance with the administrative orders of the trial court." MCR 6.110(I).

MCR 6.110(I) contemplates the prompt scheduling of an arraignment on an information but also recognizes that practices may vary throughout the state depending on local circumstances. Nonetheless, the subrule appears to require that trial courts establish a local practice by administrative order. The administrative order, of course, is subject to Supreme Court review. See MCR 8.112(B)(3).

MCR 6.113(C) states:

> "A defendant represented by a lawyer may, as a matter of right, enter a plea of not guilty or stand mute without arraignment by filing, at or before the time set for the arraignment, a written statement signed by the defendant and the defendant's lawyer acknowledging that the defendant has received a copy of the information, has read or had it read or explained, understands the substance of the charge, waives arraignment in open court, and pleads not guilty to the charge or stands mute."

Effective January 1, 2006, MCR 6.113(E) provides for the elimination of arraignments under certain circumstances. MCR 6.113(E) states:

> **"(E) Elimination of Arraignments.** A circuit court may submit to the State Court Administrator pursuant to MCR 8.112(B) a local administrative order that eliminates arraignment for a defendant represented by an attorney, provided other arrangements are made to give the defendant a copy of the information."

5.42 Circuit Court Review of Errors at Preliminary Examinations

A. Motion to Quash the Information

MCR 6.110(H) deals with motions to dismiss because of errors committed at the preliminary examination. It states that if the trial court finds a violation of subrules (C), (D), (E), or (F), it must either dismiss the information or remand the case to the district court for further proceedings.

Subrules (C), (D), (E), and (F) of MCR 6.110 cover the following topics:

(C) Conduct of examination.

(D) Exclusionary rules.

(E) Probable cause finding.

(F) Discharge of defendant.

The 1989 Staff Comment to MCR 6.110(H) states that the rule "does not address, and leaves to case law, what effect a violation of these rules or an error in ruling on a motion filed in the trial court may have when raised following conviction."

In *People v Hall,* 435 Mich 593, 602 (1990), the Supreme Court determined that errors committed at the preliminary examination should be reviewed under a harmless error analysis. Reversal of a conviction based on a faulty examination would require a showing that defendant was prejudiced by the error at trial. The case involved hearsay evidence erroneously admitted at the examination. The Court rested its ruling partly on a discussion of MCR 6.110(H) and the 1989 Staff Comment, and partly on MCL 769.26, which states that "[n]o judgment or verdict shall be set aside or reversed or a new trial be granted by any court of this state in any criminal case, on the ground of . . . the improper admission or rejection of evidence." See also *People v Moorer*, 246 Mich App 680, 682 (2001), where the Court of Appeals concluded that the circuit court erred in denying defendant's motion to quash a bindover on first-degree murder charges based on insufficient evidence of premeditation at the preliminary examination. However, the Court of Appeals also concluded that the circuit court committed only harmless error since the defendant did not contest the sufficiency of the evidence to support the jury verdict of second-degree murder. As a result, the Court stated that "any error in the sufficiency of the proofs at the preliminary examination is considered harmless." *Id*. at 682. In *People v Fielder*, 194 Mich App 682, 695 (1992), the Court of Appeals ruled that the introduction of incompetent evidence at a preliminary examination could be harmless error where sufficient competent evidence had been introduced to support a bindover on involuntary manslaughter and firearms charges.

A defendant's due process rights are not violated when a circuit court, having found a bindover decision to be clearly erroneous, remands the case to the district court for reconsideration. In *People v Dunham*, 220 Mich App 268, 276 (1996), the prosecutor, after the defendant was bound over on second-degree criminal sexual conduct charges, sought to add a charge of first-degree criminal sexual conduct in circuit court. The circuit court first granted the amendment, then in response to defendant's motion to quash the information vacated its earlier order. Then, on its own motion, it remanded to the district court to reconsider the district court's denial of bindover on the first-degree criminal sexual conduct charge. The Court of Appeals stated that the circuit court "exercised its plenary authority by remanding the case to the lower court for reconsideration of a ruling that the circuit court considered clearly erroneous." *Id.* at 276, citing MCR 6.110(H).

B. Prosecutor's Appeal to Circuit Court

*See Section 5.37, above, on the discharge of a defendant and the prosecutor's right to bring new charges.

If the defendant is discharged upon a finding of no probable cause, the prosecution may appeal to the circuit court. In *People v Robbins*, 223 Mich App 355, 361-362 (1997), the Court of Appeals quoted *People v Nevitt*, 76 Mich App 402, 404 (1977), to the effect that "[i]f the prosecutor is of the opinion that the examining magistrate erred in not binding the defendant over for trial, the better approach is to appeal to the circuit court." The *Robbins* case involved refiled charges after a first preliminary examination. The Court of Appeals stated that in cases in which a second examination is held on the same evidence as the first, an appeal is the proper course. *Robbins*, *supra* at 362.*

In *People v Yost*, 468 Mich 122, 126 (2003), the Supreme Court reviewed case law regarding the standard for reversing a magistrate's bindover decision. The Court provided:

> "Our case law has sometimes indicated that a reviewing court may not reverse a magistrate's bindover decision absent a 'clear abuse of discretion,' e.g., *People v Dellabonda*, 265 Mich 486, 491; 251 NW 594 (1933); *[People v Doss,* 406 Mich 90, 101(1979)]. At other times our case law has omitted the word 'clear' and has simply required a reviewing court find an 'abuse of discretion,' e.g., *Genesee Prosecutor v Genesee Circuit Judge,* 391 Mich 115, 121; 215 NW2d 145 (1974); [*People v Justice (After Remand)*, 454 Mich 334, 344 (1997)]."

In *Yost*, after a seven-day preliminary exam, the magistrate refused to bind the defendant over for trial on first-degree murder. The magistrate indicated that credible evidence of a homicide was lacking. *Yost, supra* at 124. The prosecutor appealed the magistrate's decision to the circuit court. The circuit court concluded that the record established a sufficient basis for finding that a homicide was committed and probable cause to believe the defendant committed it. The circuit court held that the magistrate had abused his

discretion in refusing to bind defendant over. *Id*. On leave granted, the Supreme Court upheld the circuit court's decision and stated:

> "[W]e agree with the circuit court that the expert testimony in tandem with the circumstantial evidence, which included evidence relating to motive and opportunity, was sufficient to warrant a bindover. . . . [T]he magistrate abused his discretion when he concluded from all the evidence that probable cause to bind defendant over for trial did not exist. . . . The fact that the magistrate may have had reasonable doubt that defendant committed the crime was not a sufficient basis for refusing to bind defendant over for trial. As we stated in [*People v Justice* (*After Remand*), 454 Mich 334, 344 (1997)], a magistrate may legitimately find probable cause while personally entertaining some reservations regarding guilt." *Yost, supra* at 134-134.

Part B—Checklists

5.43 Checklist 1: Conducting a Preliminary Examination

5.44 Checklist 2: Waiver of a Preliminary Examination

5.43 Checklist for Conducting a Preliminary Examination

A preliminary examination must be scheduled within 14 days of arraignment. The examination may not be adjourned, continued, or delayed except for good cause shown and placed on the record, even if both the prosecution and defense consent to the adjournment, continuance, or delay.

☐ 1. Call the case and ask for oral (or written) appearances of the prosecutor, defendant, and defense attorney (if present).

☐ 2. If defendant is not represented by counsel:

- ☐ Advise defendant of the right to an attorney at public expense if defendant is indigent.
- ☐ If defendant requests counsel, appoint counsel if defendant is indigent, or allow defendant a reasonable opportunity to retain counsel, or obtain a waiver of the right to counsel.

☐ 3. Advise defendant that if he/she is going to retain counsel, this may be treated as "good cause" to adjourn the preliminary examination beyond 14 days.

☐ 4. If the defendant desires to waive counsel, the court must first:

- ☐ advise defendant of the charge, the maximum possible penalties, any mandatory minimum sentence required by law, and the risk involved in self-representation; and
- ☐ offer the defendant the opportunity to consult with a retained lawyer or, if the defendant is indigent, the opportunity to consult with an appointed lawyer.

☐ 5. Advise defendant that he/she has a right to a preliminary examination and ask if he/she wishes to have a preliminary examination conducted or to waive the examination.

☐ 6. If defendant wishes to proceed with a preliminary examination, the court:

- ☐ Should entertain any requested stipulations of the parties.
- ☐ Must ask the prosecutor to call witnesses for examination, subject to cross-examination by the defense.
- ☐ Must ask the defense if they have any witnesses to call for examination, subject to cross-examination by the prosecution.
- ☐ Must apply Rules of Evidence to evidentiary issues.

☐ 7. Determine and state the basis for determining whether the evidence establishes:

- ☐ probable cause that a felony or circuit court misdemeanor has been committed;
- ☐ probable cause that defendant committed the felony or circuit court misdemeanor; and
- ☐ that venue is proper.

5.43 Checklist for Conducting a Preliminary Examination Continued

☐ 8. At the end of the preliminary examination, do ONE of the following:

- ☐ Discharge defendant, if there is no probable cause to believe that a felony or circuit court misdemeanor has been committed or that defendant committed it, or if venue has not been established.
- ☐ Bind defendant over for trial to the circuit court, if there is probable cause to believe that a felony or circuit court misdemeanor has been committed and that defendant committed it, and if venue has been established.
- ☐ Set case for pre-trial conference (or trial) in district court, if there is probable cause to believe that defendant committed an offense cognizable by the district court but not the circuit court.
- ☐ Transfer the case to the family division of circuit court, if there is no probable cause to believe that defendant committed a specified juvenile violation but there is probable cause to believe that defendant committed another crime.

☐ 9. Set, continue, deny, or revoke bail.

☐ 10. Execute the bindover form, SCAO Form MC 200, if defendant is bound over for trial to the criminal division of circuit court.

☐ 11. Schedule the arraignment in circuit court, or have defendant execute a written waiver of circuit court arraignment, SCAO Form CC 261, if defendant is bound over for trial.

☐ 12. Order the defendant to undergo venereal disease, hepatitis B, hepatitis C, and HIV testing in appropriate cases, SCAO Form MC 234.

5.44 Checklist for Waiver of Preliminary Examination

☐ 1. Call the case and ask for oral (or written) appearances of the prosecutor, defendant, and defense attorney (if present).

☐ 2. If defendant is not represented by counsel:

- ☐ Advise defendant of the right to an attorney at public expense if defendant is indigent.
- ☐ If defendant requests counsel, appoint counsel if defendant is indigent, or allow defendant a reasonable opportunity to retain counsel, or obtain a waiver of the right to counsel.

☐ 3. Advise defendant that if he/she is going to retain counsel, this may be treated as "good cause" to adjourn the preliminary examination beyond 14 days.

☐ 4. If the defendant desires to waive counsel, the court must first:

- ☐ advise defendant of the charge, the maximum possible penalties, any mandatory minimum sentence required by law, and the risk involved in self-representation; and
- ☐ offer the defendant the opportunity to consult with a retained lawyer or, if the defendant is indigent, the opportunity to consult with an appointed lawyer.

☐ 5. Advise defendant that he/she has a right to a preliminary examination and ask if he/she wishes to have a preliminary examination conducted or to waive the examination.

☐ 6. Advise a juvenile defendant that he/she may not waive a preliminary examination unless represented by an attorney.

☐ 7. Advise defendant:

- ☐ That he/she and the prosecutor both have a right to a preliminary examination, which is a hearing where the prosecutor must show two things: (1) probable cause to believe that a felony or circuit court misdemeanor was committed; (2) probable cause to believe that you committed it.
- ☐ That he/she will be bound over to circuit court on the charge(s) in the complaint and warrant if he/she waives the preliminary examination.

☐ 8. Ask defendant if he/she wishes to waive the right to a preliminary examination. The waiver may be on the charge(s) in the complaint or amended complaint.

☐ 9. Determine and state for the record that defendant's waiver of the preliminary examination is freely, understandingly, and voluntarily given. The court should make such a determination in every case, regardless of whether defendant is represented by counsel.

5.44 Checklist for Waiver of a Preliminary Examination Continued

☐ 10. Ask defendant (or defense counsel) and the prosecutor to state for the record:

- ☐ Any plea agreement made in exchange for the waiver of the preliminary examination; and
- ☐ Any promises made in exchange for the waiver.

☐ 11. If desired, ask defendant (and defense counsel) to read and sign the form pertaining to waivers of preliminary examinations, SCAO Form MC 200. Although executing the form is optional for adult defendants, it is not optional for juvenile defendants.

☐ 12. Ask the prosecutor is he/she waives the people's right to a preliminary examination.

☐ 13. Accept defendant's waiver and bind him/her over to circuit court on the charge(s) contained in the complaint or amended complaint.

☐ 14. Set, deny, continue, or revoke bail.

☐ 15. Execute the bindover form, SCAO Form MC 200, if defendant is bound over for trial to the criminal division of circuit court.

☐ 16. Schedule the arraignment in circuit court, or have defendant execute a written waiver of circuit court arraignment, SCAO Form CC 261, if defendant is bound over for trial.

☐ 17. Order the defendant to undergo venereal disease, hepatitis B, hepatitis C, and HIV testing in appropriate cases, SCAO Form MCL 234.